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In The

Supreme Court of the United States

CITY OF LONG BEACH,

Petitioner,

v.

LONG BEACH AREA PEACE NETWORK;
DIANA MANN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the First Amendment precludes a city from enacting a reasonable time, place and manner regulation in order to recoup the cost of city services required to remove litter and debris caused by special events conducted on public property.

II. Whether a time, place and manner regulation enacted to recoup the cost of city services provided for the purpose of "crowd control" and "construction" for a special event conducted on city property is not narrowly tailored to serve a substantial governmental interest.

III. Whether the First Amendment precludes a city from waiving otherwise permissible time, place and manner regulations absent a pattern of unlawful favoritism.

IV. Whether the availability of streets and sidewalks provide ample alternative means of communication for persons unable to meet the permitting or notice requirements for a special event on public property.

V. Whether the First Amendment precludes a city from seeking indemnification for liability it may incur caused by the acts or omissions of a permittee conducting a special event on public property.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

The City of Long Beach is a municipal corporation organized under the laws of the State of California.

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OPINIONS BELOW

The Court of Appeals for the Ninth Circuit denied the Petition for Rehearing and Rehearing En Banc and issued an amended opinion, reported at 574 F.3d 1011, which is reproduced in the Appendix at App. 2. The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 522 F.3d 1010, is reproduced in the Appendix at App. 74. The unreported opinion of the United States District Court for the Central District of California is reproduced in the Appendix at App. 151.

JURISDICTION

The Court of Appeals issued an opinion on April 15, 2008. App. 74. The Court of Appeals denied petitioner's timely Petition for Rehearing and Rehearing En Banc and issued an amended opinion on July 24, 2009. App. 2. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

United States Constitution, Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances."

The City of Long Beach regulates special events conducted on public property involving large groups, or requiring the provision of City services through a permit ordinance. The provisions of that Ordinance are reproduced in the Appendix at App. 191.

STATEMENT OF THE CASE

The City of Long Beach ("City"), like all cities, counties, states, and the federal government (including the National Parks Service and General Services Administration) routinely allows organizers to conduct large special events on public property. In Long Beach, these special events range from a protest in a park, to the Long Beach Jazz Festival, Long Beach Marathon, and Toyota Grand Prix of Long Beach. Elsewhere, special events range from a rally on the steps of a federal building (requiring a permit from the General Services Administration) to a large scale demonstration in a national park or on the Mall in Washington, D.C. (requiring a permit from the National Park Service).

In order "to coordinate multiple uses of limited space, to assure preservation of the . . . [public] facilities, . . . , and to assure financial accountability

for damage caused by the event,"[1] the City drafted a special events ordinance modeled after those approved by this Court from *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) to *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002), requiring event organizers to obtain a special event permit from the City ("Ordinance").

The Ordinance (as implemented through Administrative Regulation AR 8-28 (App. 223)) requires, *inter alia*, that persons seeking to conduct an organized activity involving seventy-five (75) or more persons on or impacting public property must first obtain a permit when the activity is likely to require the City to provide delineated services – street blockage, erecting barriers, construction, traffic control, crowd control, and/or litter abatement (for amounts in excess of that normally expected for the public property or facilities involved) – in response thereto. LBMC § 5.60.010(I)(3) (App. 194); Administrative Regulation AR 8-28 (App. 223).

The Ordinance provides that the permit fee shall be set by city council resolution. LBMC § 5.60.050(A) (App. 210). Indigent persons who intend to engage in "expressive activity"[2] are not required to pay the

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[1] *Thomas v. Chicago Park District*, 534 U.S. 316, 322, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002).

[2] "'Expressive Activity' means conduct, the sole or principal object of which is the expression, dissemination or communication by verbal, visual, literary or auditory means of opinion,

(Continued on following page)

permit fee. LBMC § 5.60.050(B) (App. 210-11). Permittees are also required to reimburse the City for all City departmental services charges[3] incurred in connection with or due to the permittee's activity under the permit. LBMC § 5.60.090(A) (App. 217). "Departmental services charges" are the actual costs incurred by the City for services provided, but specifically do not include costs incurred by the City to provide police protection to those engaged in "expressive activity." LBMC § 5.60.010(C) (App. 192). The Ordinance provides that permit fees and/or departmental services charges may be funded, partially funded, or waived by action of the City council. LBMC § 5.60.090(A) (App. 217).

The Ordinance has an indemnification and/or hold-harmless provision which states that "[e]ach permit shall expressly provide that the permittee agrees to defend, protect, indemnify and hold the city . . . harmless from any . . . claims . . . or liability . . . arising out of, or resulting from . . . acts . . . of [the] permittee . . . in connection with the permitted event or activity . . . " LBMC § 5.60.080(A) (App. 214-15).

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views or ideas. Expressive activity includes, but is not limited to, public oratory and the distribution of literature." LBMC § 5.60.010(D).

[3] "'Departmental services charges' means the actual costs which a department of the city incurs in connection with activities for which a permit is required . . . [but] shall not include costs incurred by the city to provide police protection to those engaged in 'expressive activity' as that term is defined in this chapter." LBMC § 5.60.010(C).

The Ordinance provides that "spontaneous parades, assemblies or demonstrations involving expressive activity and which are occasioned by news or affairs coming into public knowledge within five (5) days of such parade, assembly or demonstration" ("spontaneous events") are exempt from the permitting requirement, provided that organizers give written notice to the City manager at least twenty-four (24) hours prior to such parade or assembly specifying contact information; date, time, location and route; estimated number of participants/observers; and arrangements so that participants are properly directed. LBMC § 5.60.030(A)(5) (App. 199-200). The City manager may deny permission to conduct a spontaneous parade, assembly or demonstration if the City manager makes a finding based upon specified criteria. *Id.*

The Ordinance provides alternate channels for communication for groups unable to obtain, or denied, (1) a special event permit or (2) permission to conduct a spontaneous parade, assembly or demonstration by allowing such groups to conduct their event on any sidewalk, street, or public right of way as long as they comply with applicable traffic regulations. LBMC § 5.60.030(A)(3) (App. 198).

On or about February 7, 2003, Long Beach Area Peace Network applied for a permit for a march and rally to be conducted on February 15, 2003 with an anticipated attendance of 200 persons ("February Event"). Excerpts of Record ("ER") 38. The February Event was originally scheduled to occur on City

streets and Lincoln Park. *Id.* at 48. Ultimately, the February Event was conducted on the sidewalks and in the park and did not require the City to provide services in order to block streets and/or detour traffic. *Id.* Accordingly, no departmental service charges were assessed to Peace Network. *Id.*

In March 2003, Long Beach Area Peace Network applied for a permit to conduct a march and rally on March 22, 2003 with an anticipated attendance of 3,000 persons ("March Event"). *Id.* at 33. Contrary to the February Event, the March Event was conducted as "a march on City streets," with "a rally at Bixby Park," requiring the "[f]ull closure of Ocean Boulevard . . . between Alamitos Avenue and Junipero Street" (a 1.19 mile section), requiring "traffic and pedestrian control," "traffic diversion and or detours," the blockage of the "western portion of the Junipero [Parking] Lot" as a staging area; the posting of a temporary no parking area on First Street between Cherry Avenue and Junipero Avenue; the posting of a temporary no parking area on Second Street between Cherry and Junipero Avenue; the closure of Cherry Avenue and Junipero Avenue between Broadway and Ocean Boulevard; the erection of a portable stage in Bixby Park; and the delivery and installation of temporary restroom facilities. *Id.* at 33-34.

Peace Network was advised that they would be liable for the costs incurred by the City in providing these services for the March Event and were provided with a cost estimate of $7,041. *Id.* at 35. In lieu of incurring the significant costs for street closures,

Peace Network was afforded the option of (1) marching on the sidewalk of Ocean Boulevard or (2) marching on the bike path – both of which would incur no City costs. Peace Network, nevertheless, insisted on conducting the March Event on City streets thereby requiring the street closures. *Id.* at 48.

Peace Network was allowed to make a down payment and additional payments after the March Event. *Id.* at 49. After Peace Network failed to make any payments after the March Event, the City brought a small claims action against Peace Network and obtained a judgment. *Id.* at 40. Thereafter, Peace Network brought the within federal action challenging the constitutionality of the Ordinance.

On November 15, 2004, District Judge S. James Otero found the Ordinance to be unconstitutional and granted a preliminary injunction enjoining the City of Long Beach from enforcing the Ordinance. App. 151. On January 10, 2005, Judge Otero issued an order consolidating the hearings on the preliminary and permanent injunctions and permanently enjoined the City from enforcing the Ordinance. App. 146. The City appealed to the Ninth Circuit.

On April 15, 2008, a panel of the Ninth Circuit Court of Appeals affirmed in part and reversed in part and upheld the constitutionality of the Ordinance with the exception of four provisions. Appellant City of Long Beach timely filed a petition for panel rehearing and petition for rehearing en

banc. On July 24, 2009, the Ninth Circuit denied the petitions and filed an amended opinion.

The panel held that the First Amendment precluded the City from requiring a permit when it is likely that City services will be required to remove litter generated by a special event because (1) "litter abatement is [not] a substantial governmental interest" (App. 50), (2) the regulation constituted a "prior restraint on expressive activity" (App. 50), and (3) a permitting requirement not addressing a threat to public safety or traffic interference is invalid (App. 49).

The panel held that requiring a permit when an event is likely to require the provision of City services for the purpose of "crowd control" or "construction" was unconstitutional because these terms require "a more precise definition." App. 50.

The panel held that the Ordinance's assessment of a permit fee and departmental service charges was constitutionally permissible, but, nevertheless, held that the City's ability to waive these otherwise permissible fees constituted "unbridled discretion" and was unconstitutional. App. 64.

Although persons unable to comply with the Ordinance's notice requirements for "spontaneous events" may alternatively conduct their event on City "streets, sidewalks, or other public rights-of-way . . . wherein applicable traffic regulations, laws, or controls are complied with" (LBMC § 5.60.030(A)(3) (App. 198)), the panel held that "the regulation fails

to provide ample alternative means of communication for people wishing to participate in spontaneous expressive events" (App. 56).

Finally, the panel held that the City's provision seeking indemnification for City liability caused by the actions of permittees involved in special events on public property was not narrowly tailored to serve a substantial governmental interest, because it could be broadly read to include indemnification for the acts of third parties. App. 57.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeals follows a practice of determining First Amendment issues relating to municipal permitting schemes by relying on Circuit opinions contrary to "an unbroken line [of controlling United States Supreme Court decisions] spanning more than six decades . . . [which they] are bound to follow." *Berger v. City of Seattle*, 569 F.3d 1029, 1066 (9th Cir. 2009) (Chief Judge Alex Kozinski, dissenting).

The practice identified by Chief Judge Kozinski was adhered to by the Ninth Circuit hereinbelow when it found unconstitutional portions of the City of Long Beach's Special Events Ordinance which were specifically modeled after provisions approved by this Court not only in *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002), but the other decisions to which Chief Judge Kozinski

refers. Moreover, the Long Beach provisions accord with other Circuits' decisions involving all but identical permitting requirements.

"[B]y insisting upon a degree of rigidity that is found in few legal arrangements" (*Thomas*, 534 U.S. at 325), the Ninth Circuit now places the City of Long Beach, and all other similarly situated municipalities, in the untenable position of foregoing specifically authorized reasonable time, place and manner regulations essential to not only the proper administration of public facilities, but the protection of the public treasury by "assur[ing] financial accountability for damage caused by . . . [an] event [conducted on public property]." *Thomas v. Chicago Park District*, 534 U.S. at 322.

Consequently, the Ninth Circuit has shifted the financial burden associated with these special group events from the participants to the government, thereby conflicting with this Court and other Circuits. Such a shift is best exemplified by the panel's holding here that the First Amendment (1) precludes a City from requiring a permit in order to recover City costs expended to remove litter generated by large special events on public property; and (2) prohibits the City from obtaining indemnification for liability it may incur resulting from the actions of a permittee in connection with an event conducted on public property. This, the First Amendment does not require. *Thomas v. Chicago Park District*, *supra*, 534 U.S. at 316; *Cox v. New Hampshire*, *supra*, 312 U.S. 569.

Additionally, by finding that the City's ability to waive or excuse otherwise permissible time, place and manner regulations is unconstitutional, the panel directly conflicts with this Court and the Sixth Circuit which found that such a permissive waiver of these otherwise constitutional provisions "furthers, rather than constricts, free speech." *Thomas v. Chicago Park District*, *supra*, 534 U.S. at 325; *accord Parks v. Finan*, 385 F.3d 694 (6th Cir. 2004).

Moreover, the panel's finding that the availability of any street, sidewalk, or other public right-of-way does not provide adequate alternate channels of communication to persons unable to obtain, or denied, permission to conduct a spontaneous parade or assembly directly conflicts with this Court's decisions in *Poulos v. New Hampshire*, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed.2d 1105 (1953) and *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) ("'time out of mind' public streets and sidewalks have been used for public assembly and debate, [and are] the hallmarks of a traditional public forum.") (citations omitted).

Lastly, the panel's determination that requiring a permit when special events are likely to require City services for the purpose of "crowd control" or "construction" is not narrowly tailored to serve a substantial governmental interest (because these terms need to be more precisely defined), conflicts not only with this Court's decision in *Ward v. Rock Against Racism*, 491 U.S. 781, 795, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) ("perfect clarity and precise

guidance have never been required even of regulations that restrict expressive activity"), but National Park Service regulations that contain these very terms.

As foretold by Chief Judge Kozinski, the Ninth Circuit's First Amendment opinions, here and elsewhere, reject "effective regulations [and] ... demand[ ] perfection" (*Berger v. City of Seattle*, *supra*, 569 F.3d at 1061), "takes the concept of a facial challenge to the extremes, conjuring up all manner of hypothetical people who could be affected by the regulations, even though there's no real possibility that the rules will be applied in such a counterproductive manner" (*id.* at 1062), "raise the rights of others in an overbreadth challenge . . . [even though] there is [not] 'a realistic danger' that the challenged rule 'will significantly compromise recognized First Amendment protections of parties not before the Court'" (*id.* at 1062-63 (quoting *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1994)), "turn[s] up its nose at [controlling Supreme Court decisions]" (*id.* at 1066), "stands the concept of narrow tailoring on its head" (*id.* at 1067), ignore[s] "obvious and common-sense reasons to require a permit" (*id.* at 1069), and "focus[es] on largely imaginary First Amendment injuries which might be suffered by largely imaginary people" (*id.* at 1073). Indeed, "[n]o rules written by man can withstand such persnickety scrutiny." *Id.* at 1061.

The Ninth Circuit's failure to follow this Court's mandate has placed the Ninth Circuit at odds with the rest of the country in an area of significance to every city, county, state, and the federal government. Therefore, it is respectfully requested that the City of Long Beach's Petition for Writ of Certiorari be granted for each and all of the reasons set forth in detail below.

I. The Ninth Circuit Has Decided Important First Amendment Questions In A Way That Directly Conflicts With Relevant Decisions Of This Court And Other Circuits

This case epitomizes the difficulty courts have in balancing the countervailing First Amendment interests expressed in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992), against the legitimate governmental interests expressed in *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) and *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002).

In *Cox v. New Hampshire*, *supra*, and *Thomas v. Chicago Park District*, *supra*, this Court drew a distinction between regulations based upon the content of speech and content-neutral time, place and manner regulations. Indeed, content-based regulations are subject to strict scrutiny; whereas, content-neutral time, place and manner regulations "are valid

provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

Accordingly, this Court held that a content-neutral ordinance requiring a permit and a fee for group events to be conducted on public property was a reasonable time, place and manner regulation necessary to accomplish the significant governmental interest in "coordinat[ing] multiple uses of limited space, . . . assur[ing] preservation of . . . [government] facilities, . . . prevent[ing] uses that are dangerous, unlawful, or impermissible . . . , and . . . assur[ing] financial accountability for damage caused by the event." *Thomas*, *supra*, 534 U.S. at 322; *accord Cox v. New Hampshire*, *supra*, 312 U.S. 569.

In *Forsyth County v. Nationalist Movement*, *supra*, 505 U.S. 123, this Court ruled that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob" and held that governmental entities cannot assess a permit fee base upon a listener's reaction to speech. 505 U.S. at 134-35.

In the intervening years, the Ninth Circuit has blurred the distinction between the *content-based* ordinance exemplified in *Forsyth County* and the *content-neutral* regulations exemplified in *Cox*, *supra*,

312 U.S. 569, and *Thomas*, *supra*, 534 U.S. at 322, and has established its own jurisprudence relating to governmental permitting schemes, contrary to the holdings of this Court and other Circuits.

Notwithstanding the fact that provisions of the Long Beach Ordinance are all but identical to provisions specifically approved by this Court and other Circuits, the Ninth Circuit found several of the Long Beach provisions to be unconstitutional, thereby causing conflict and inconsistent application in this most important constitutional area.

A. The First Amendment Does Not Preclude A City From Enacting Reasonable Time, Place And Manner Regulations In Order To Recoup The Cost Of City Services Required To Remove Litter And Debris Resulting From A Special Event Conducted On Public Property

The Ordinance provides that a permit is required when large special events conducted on City property are "likely to require the provision of City services for the purpose of . . . litter abatement (for amounts in excess of that normally expected for the public property or facilities involved)." LBMC § 5.60.010(I)(3) (App. 194) (as implemented by Administrative Regulation AR 8-28) (App. 223).

Although the panel found this provision to be content-neutral, the panel determined that the

provision was unconstitutional because "the government's interest in litter abatement is not sufficient to justify a prior restraint on expressive activity through a permitting requirement." App. 50 (citing *Schneider v. New Jersey*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939)).

Not only does the panel inappropriately apply a *content-based* test to an admittedly *content-neutral* provision, but, the panel's conclusion that litter abatement is not a significant governmental interest conflicts, not only with the cited authority of *Schneider v. New Jersey*, *supra*, 308 U.S. 147, but with over sixty years of United States Supreme Court precedent from *Cox v. New Hampshire*, *supra*, 312 U.S. 569, to *Thomas v. Chicago Park District*, *supra*, 534 U.S. at 322. Moreover, the panel incorrectly asserts that reasonable time, place and manner regulations are limited to public safety concerns.

1. *Schneider v. New Jersey* Does Not Prohibit Governments From Enacting Reasonable Time, Place And Manner Regulations In Order To Recoup Costs Of Litter Abatement Caused By Large Special Events

Schneider v. New Jersey, *supra*, 308 U.S. 147, dealt with an ordinance forbidding the distribution of "any hand-bill to or among pedestrians along or upon any street, sidewalk or park . . . " in an attempt to curb litter. *Schneider*, 308 U.S. at 148. As such, that ordinance was a complete and absolute ban on free

expression – not a *content-neutral* reasonable time, place and manner regulation as is the case here.

As noted by this Court, a content-neutral permitting scheme "differs *toto coelo*" from one giving "an official authority to censor the content of a speech." *Thomas v. Chicago Park District*, 534 U.S. at 322 (citing *Niemotko v. Maryland*, 340 U.S. 268, 282, 95 L.Ed. 267, 71 S.Ct. 325 (1951) (Frankfurter, J., concurring in result)). Moreover, the test for the validity of a content-based regulation is not interchangeable with the test for a content-neutral time, place and manner regulation. *Frisby v. Schultz*, 487 U.S. 474, 482, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) ("the appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content"); *Cox v. New Hampshire*, *supra*, 312 U.S. at 577 (a reasonable time, place and manner regulation cannot be judged the same as an ordinance absolutely banning free expression); *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316.

Here, the panel mixed constitutional metaphors and found the Ordinance to be *content-neutral* yet, paradoxically, declared litter abatement to be "a prior restraint on expressive activity." App. 50. The panel's citation to *Schneider v. New Jersey*, *supra*, 308 U.S. 147, for this proposition utterly ignores this Court's determination that *Schneider* is "not applicable" to reasonable time, place and manner regulations. *Cox v. New Hampshire*, 312 U.S. at 577-78.

Indeed, contrary to the ordinance in *Schneider v. New Jersey*, *supra*, 308 U.S. 147, the Long Beach Ordinance does not seek to preclude the distribution of any items at a special event – it simply imposes a reasonable time, place and manner regulation seeking financial accountability for City services required to remove the excess trash and debris left by a special event.

The present situation is more analogous to that in *Paulsen v. Gotbaum*, 982 F.2d 825 (2nd Cir. 1992). There, the Second Circuit upheld a content-neutral provision requiring a clean-up bond for special events conducted in New York City parks, noting that the regulation was "easily distinguishable [from cases] . . . involv[ing a] complete ban[ ] on a certain type of speech [or] . . . involv[ing] content-based regulations." 982 F.2d at 829.

As with Long Beach, "[s]pecial events in New York City parks do draw large crowds which increase litter in the parks." *Id.* Indeed, similar to the "concerts by Pavarotti and Paul Simon, the New York City Marathon, and the Billy Graham Crusade" (*id.*) conducted in New York City Parks, the Long Beach City Marathon and Toyota Grand Prix of Long Beach are conducted on public property in the City of Long Beach – "all of which attract thousands of people." *Id.* Moreover, "'the validity of [the] regulation need not be judged solely by reference to the demonstration at hand.'" *Paulsen v. Gotbaum*, *supra*, 982 F.2d at 829 (quoting *Clark v. Community for Creative*

Non-Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)).

Properly viewed, the City of Long Beach has enacted a reasonable time, place and manner regulation to achieve its substantial governmental interest in assuring financial accountability for the cost of removing litter generated by a special event.

2. A City Has A Significant Governmental Interest In Assuring Financial Accountability For The Cost Of Removing Litter Generated By A Special Event

In *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316, this Court held that a municipality may properly impose reasonable time, place and manner regulations in order "to assure preservation of park facilities, . . . and to assure financial accountability for damage caused by the event." *Thomas v. Chicago Park District*, 534 U.S. at 322; *accord Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

The Ninth Circuit's decision notwithstanding, financial accountability for City services required to remove litter left on public property by a special event is a significant governmental interest. *Cox v. New Hampshire*, *supra*, 312 U.S. 569; *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316; *Horina v. City of Granite City*, 538 F.3d 624, 633 (7th Cir. 2008) ("the prevention of litter . . . is a substantial

government interest"); *Paulsen v. Gotbaum*, 982 F.2d 825, 830 (2nd Cir. 1992) (Cities have a "substantial governmental interest in conserving parks" and "keep[ing] parks free from litter").

3. Reasonable Time, Place And Manner Regulations Are Not Limited To Those Dealing With Traffic Or Public Safety

The Ninth Circuit intimates that content-neutral time, place and manner permit requirements that do not interfere with vehicular or pedestrian traffic, or pose a threat to public safety, are not narrowly tailored to serve a significant governmental interest. App. 49 ("permitting requirement was valid to the extent that the event was likely to interfere with the use of public ways[,] . . . violate traffic regulations . . . [, or] pose a threat to public safety . . . [but, a permitting requirement for] events that may require nothing more than City public services to deal with litter" is invalid); App. 55 ("the spontaneous event regulation [is invalid because it] . . . appl[ies] to assemblies in places where there is no threat of disruption of the flow of pedestrian or vehicular traffic"); *See also Berger v. City of Seattle*, 569 F.3d 1029, 1046 (9th Cir. Wash. 2009) ("the permitting requirement applies to street performers who pose no realistic coordination or traffic flow concerns . . . ").

Such a narrow interpretation of what constitutes a "significant government interest," however, is in

direct conflict with this Court's holdings in *Cox v. New Hampshire*, 312 U.S. at 577 (a municipality may require a permit and fee "to meet the expense incident to the administration of the Act and to the maintenance of public order in matter licensed") and *Thomas v. Chicago Park District*, *supra*, 534 U.S. at 322 (a municipality may properly issue special event permits in order "to assure preservation of park facilities, . . . and to assure financial accountability for damage caused by the event").

Accordingly, governmental entities are not precluded from enacting reasonable time, place and manner regulations seeking financial accountability for City services utilized in removing litter and debris generated by a special event conducted on public property.

B. A Time, Place And Manner Regulation Enacted To Recoup The Cost Of City Services Provided For "Crowd Control" And "Construction" Is Narrowly Tailored To Serve A Substantial Governmental Interest

The panel held that requiring a special event permit when an "activity is likely to require the provision of City services for the purpose of . . . construction [or] . . . crowd control" was not narrowly tailored to serve a substantial governmental interest noting that "[t]hese two services *could* be sufficiently related . . . but, a more precise definition would be needed before we could conclude that they were."

App. 50 (emphasis original). Such a determination not only conflicts with *Cox v. New Hampshire*, *supra*, 312 U.S. 569, and *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316, but with the cited authority of *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

As with litter abatement, the City is simply seeking "financial accountability" for costs it incurs by providing these services for special events conducted on public property.[4] Accordingly, recovery of these costs is a significant governmental interest. *Cox v. New Hampshire*, *supra*, 312 U.S. 569; *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316. Moreover, the Ninth Circuit's need of a more precise definition conflicts with *Ward v. Rock Against Racism*, *supra*, 491 U.S. 781.

Ward v. Rock Against Racism, *supra*, 491 U.S. 781, held that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.*, 491 U.S. at 795. "'Condemned to the use of words, we can never expect mathematical certainty in our language.'" *Id.*

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[4] The only conceivable concern is if these services somehow related to costs incurred to provide police protection to those engaged in First Amendment activities (*see Forsyth County v. Nationalist Movement*, *supra*, 505 U.S. 123); however, recovery of such costs is specifically prohibited by the LBMC § 5.60.010(C) (App. 192), which specifically provides that recoverable costs "shall not include costs incurred by the city to provide police protection to those engaged in 'expressive activity' as that term is defined in this chapter."

491 U.S. at 795 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)); *see also Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (rejecting vagueness challenge to City ordinance forbidding "loud and raucous" sound amplification) (opinion of Reed, J.).

Within the context of the Ordinance, "crowd control" and "construction" relate to City services provided in response to a special event conducted on City property. App. 224. "The words . . . are marked by 'flexibility and reasonable breadth, rather than meticulous specificity,' [citation], but . . . it is clear what the ordinance [requires]." *Grayned v. City of Rockford*, *supra*, 408 U.S. at 111. Moreover, it is difficult to see how these terms could be more specific. Both the terms "crowd control" and "construction" are common-sense terms that are utilized in similar ordinances such as the National Park Service ordinance for the National Capital Region. *See* 36 C.F.R. § 7.96(g)(5)(xii)(A) ("Sound amplification equipment may not be used on the White House sidewalk, other than [for] *crowd-control* purposes") and 36 C.F.R. § 7.96(j)(1) ("In Lafayette Park the storage of *construction* material . . . is prohibited") (emphasis added).

Consequently, contrary to the panel's determination, seeking financial accountability for the provision of City services for the purpose of crowd control and/or construction is an "obvious and common-sense reason[ ] to require a permit" (*Berger v. City of Seattle*, *supra*, 569 F.3d at 1029 (Chief Judge

Kozinski, dissenting)) and does not offend the Constitution.

C. The Ability To Waive Otherwise Permissible Permit Fee And Department Service Charges Does Not Violate The First Amendment

Although the panel held the Ordinance's assessment of a permit fee and departmental services charges was constitutionally permitted, it, nevertheless, held that the City's ability to waive these otherwise permissible fees constituted "unbridled discretion" and was unconstitutional. App. 64. That holding conflicts with this Court's holding in *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316, and the Sixth Circuit's holding in *Parks v. Finan*, 385 F.3d 694 (6th Cir. 2004).

1. The Test Of "Unbridled Discretion" Is Limited To The Absolute Prohibition Of First Amendment Activities, Not The Waiver Of Constitutionally Permissible Time, Place And Manner Requirements

In *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316, this Court held that the ability to absolutely prohibit First Amendment activity differs entirely from the ability to waive and/or excuse a permittee's compliance with otherwise constitutional time, place

and manner requirements, and cannot be judged by the same standard.

Similar to the waiver of the permit fee and departmental service charge in the present case, the Chicago Park District Code under review in *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316, provided that the special event permit requirement of "a user fee, security deposit[ ], or certificate of insurance" could be waived by the Chicago Park District General Counsel. Chicago Park District Code C.6.c (judicially noticed by the panel). In rejecting the contention that the waiver of these permissible requirements "allows the Park District to waive the permit requirements for some favored speakers, while insisting upon them for others" (*Thomas v. Chicago Park District*, *supra*, 534 U.S. at 324), this Court held:

> "Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements. . . . The prophylaxis achieved by insisting upon a rigid, no-waiver application of the ordinance requirements would be far outweighed, we think, by the accompanying senseless prohibition of speech (and of other activity in the park) by organizations that fail to meet the technical requirements of the ordinance but for one

> reason or another pose no risk of the evils that those requirements are designed to avoid. On balance, we think the permissive nature of the ordinance furthers, rather than constricts, free speech."

Thomas v. Chicago Park District, *supra*, 534 U.S. at 325.

Similarly, in *Parks v. Finan*, 385 F.3d 694 (6th Cir. 2004), the Sixth Circuit held that "[b]ecause the waiver provision does not act as a restriction on expressive activity, the discretion must be treated differently from that contained in the bases for granting or denying a permit [and that e]ven where discretion is broad, we would generally not invalidate a waiver provision for overly broad discretion unless and until there is a showing of 'a pattern of unlawful favoritism.'" *Parks v. Finan*, 385 F.3d 694, 700 (6th Cir. 2004) (quoting *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316).

The panel's attempt to distinguish *Thomas v. Chicago Park District*, *supra*, demonstrates a fundamental misunderstanding of that case. Indeed, *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316, held that the permissive nature of a waiver "furthers, rather than constricts, free speech." 534 U.S. at 325. Moreover, contrary to the panel's understanding, the waiver approved of in *Thomas v. Chicago Park District*, *supra*, is not limited to a permit "application's 'fail[ure] to meet . . . technical requirements.'" App. 68.

In proper context, *Thomas* held that in order to avoid the "senseless prohibition of speech, [a permissive waiver is appropriate for] . . . organizations that fail to meet the technical requirements of the ordinance but for one reason or another *pose no risk of the evils that those requirements are designed to avoid.*" *Thomas v. Chicago Park District*, *supra*, 534 at 325 (emphasis added).

Thus, *Thomas* holds that in order to "further[ ], rather than constrict[ ], free speech," any constitutionally permissible time, place and manner regulation may be waived or excused provided that (1) doing so poses no risk of the evils the requirement was designed to avoid and (2) there is no evidence of "a pattern of unlawful favoritism." *Thomas v. Chicago Park District*, *supra*, 534 U.S. at 325. Consequently, the panel's emphasis on the word "technical" is misplaced.

At the very least, *Thomas* stands for the proposition that provisions similar to the ones in *Thomas* may be permissibly waived. Contrary to the panel's determination, the challenged provision of the Ordinance (waiver of permit fee or department service charge) is strikingly similar to the provision in *Thomas* (waiver of the user fee, security deposit, or certificate of insurance). Thus, as noted in *Thomas*, the waiver of these provisions "furthers, rather than constricts, free speech" and poses no risk of the evils that these requirements were designed to avoid. *Thomas v. Chicago Park District*, 534 U.S. at 325.

Accordingly, the Ninth Circuit's opinion to the contrary is in direct conflict with this Court's decision in *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316, and the Sixth Circuit's decision in *Parks v. Finan*, *supra*, 385 F.3d 694. Further, there is no evidence of "a pattern of unlawful favoritism" (*Thomas v. Chicago Park District*, 534 U.S. at 325) in the present case.

2. There Is No Pattern Of Unlawful Favoritism In The Present Case

In dicta, the Ninth Circuit asserts that "the record contains evidence of content-based favoritism . . . [contending that the] Peace Network held two *similar* events, separated by less than two months" – the first event "attended by government officials" in which no fee was assessed, and the second event "not attended by government officials" in which a fee was assessed. App. 70 (emphasis added). These alleged facts, of and by themselves, allegedly demonstrate "favoritism [which] is a manifestation of the very dangers inherent in unbridled discretion." App. 70.

Beyond the fact that the waiving of fees in one instance does not demonstrate "a pattern of unlawful favoritism," the record readily shows, the two "similar" events cited by the Ninth Circuit were anything but similar.

The permit application for the February Event gave an estimated attendance of 200 persons. ER: 38. Furthermore, "[a]s the February Event was limited to

sidewalks and the park[,] and did not require the blocking of streets, there were no City costs charged to" Peace Network. ER: 48.

Conversely, the permit application for the March Event gave an estimated attendance of 3,000 persons, to be conducted as "a march on City streets," with "a rally at Bixby Park," requiring the "[f]ull closure of Ocean Boulevard . . . between Alamitos Avenue and Junipero Street" (a 1.19 mile section), requiring "traffic and pedestrian control," "traffic diversion and or detours," the blockage of the "western portion of the Junipero [Parking] Lot" as a staging area, the posting of a temporary no parking area on First Street between Cherry Avenue and Junipero Avenue, the posting of a temporary no parking area on Second Street between Cherry and Junipero Avenue, the closure of Cherry Avenue and Junipero Avenue between Broadway and Ocean Boulevard, the erection of a portable stage in Bixby Park, and the delivery and installation of temporary restroom facilities. ER: 33-34.

Therefore, the panel's determination that the ability to waive otherwise permissible time, place and manner regulations is unconstitutional is contrary to the decisions of this Court and the Sixth Circuit. Moreover, the panel's determination necessarily constricts rather than furthers free speech. *See Thomas v. Chicago Park District*, *supra*, 534 U.S. at 325.

D. The Availability Of Streets And Sidewalks Provide Ample Alternative Means Of Communication For Persons Unable To Meet Special Event Permit Requirements

The Ordinance provides that spontaneous parades, assemblies or demonstrations involving expressive activity are exempt from the permitting requirement so long as organizers give written notice to the City manager at least twenty four (24) hours prior to such parade, assembly or demonstration. LBMC § 5.60.030(A)(5) (App. 199). The Ordinance provides alternate channels for communication for groups unable to obtain or denied (1) a special event permit or (2) permission to conduct a spontaneous parade, assembly or demonstration, by allowing such groups to conduct their event on any "street[ ], sidewalk[ ], or other public rights-of-way owned or controlled by the City . . . [so long as] applicable traffic regulations, laws or controls are complied with." LBMC § 5.60.030(A)(3) (App. 198).

Nevertheless, although the panel found Long Beach Ordinance's 24-hour notice requirement for spontaneous events to be content-neutral, it held this provision to be unconstitutional because, *inter alia*, "the regulation fails to provide ample alternative means of communication for people wishing to

participate in spontaneous expressive events." App. 56.[5]

Such a holding not only ignores that "'time out of mind' public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum" (*Frisby v. Schultz*, 487 U.S. 474, 480, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (citing *Boos v. Barry*, 485 U.S. 312, 318, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988); *Cornelius v. NAACP Legal & Educational Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); *Hague v. Committee For Industrial Organization*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939))), but is in direct conflict with this Court's holdings in *Frisby v. Schultz*, *supra*, 487 U.S. 474; *Poulos v. New Hampshire*, 345 U.S. 395, 406, 73 S.Ct. 760, 97 L.Ed.2d 1105 (1953); and *Cox v. New Hampshire*, *supra*, 312 U.S. 569.

In *Poulos v. New Hampshire*, *supra*, 345 U.S. 395, this Court held that "[t]he principles of the First

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[5] The Ninth Circuit also held the spontaneous event regulation unconstitutional because "the spontaneous event regulation – and the twenty-four-hour advance notice requirement – apply to assemblies in places where there is no threat of disruption of the flow of pedestrian or vehicular traffic." App. 55. Such a conclusion conflicts with decisions of this Court and was addressed previously in this writ at section I.A.3.

Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction." 345 U.S. at 405. An ordinance does not fail for lack of adequate alternatives so long as there are avenues for "the general dissemination of a message." *Frisby v. Schultz*, *supra*, 487 U.S. at 483.

Frisby v. Schultz, *supra*, 487 U.S. 474, dealt with a content-neutral ordinance that prohibited "picketing taking place solely in front of a particular residence." 487 U.S. at 483. This Court held that, since the ordinance was limited in scope to picketing in front of a single residence, "the ordinance permits . . . general dissemination of a message . . . [and] preserves ample alternative channels of communication" including all streets and sidewalks. 487 U.S. at 483-84.

By not requiring a permit for "events which take place on streets, sidewalks, or other public rights-of-way owned or controlled by the City . . . wherein applicable traffic regulations, laws or controls are complied with" (LBMC § 5.60.030(A)(3)) (App. 198), the Long Beach Ordinance "makes it virtually self-evident that ample alternatives remain" (*Frisby v. Schultz*, *supra*, 487 U.S. at 484).

Accordingly, the panel's determination that streets and sidewalks do not provide adequate alternate channels of communication is in direct conflict with the decisions of this Court.

E. The Panel's Finding That The Hold-Indemnification Provision Is Unconstitutional Is In Direct Conflict With The Third Circuit And Is Inconsistent With The Decisions Of This Court

In furtherance of its significant governmental interest in "assur[ing] financial accountability for damage caused by . . . [an] event" (*Thomas v. Chicago Park District*, *supra*, 534 U.S. at 322) and avoiding liability, the Ordinance contains an indemnification/hold-harmless provision requiring permittees to indemnify and hold the City harmless for any "claims, damages, expenses, loss, or liability . . . arising out of, or resulting from the alleged acts or omissions of [a] permittee . . . in connection with the permitted event or activity . . . " ("indemnification provision"). LBMC § 5.60.080(A) (App. 214-15). Such a provision is identical in all significant respects to the Chicago Park District Code at issue in *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316, a similar provision approved by the Third Circuit in *Nationalist Movement v. City of York*, 481 F.3d 178 (3rd Cir. 2007), and that used by the federal General Services Administration ("GSA") across the country. *See also* National Park Service Special Event ordinance (36 C.F.R. § 2.50).

Nevertheless, the panel held that the indemnification provision was "not narrowly tailored to serve a substantial governmental interest" (App. 57), because the language "arising out of, or resulting from the alleged or omissions" of the permittee during the "conduct of the event" could broadly be

interpreted as requiring indemnification for the actions of third parties. App. 59.

Such a determination (1) directly conflicts with other Circuits which have upheld the constitutionality of similar provisions, (2) is inconsistent with the decisions of this Court, and (3) effectively forecloses cities, states, and the federal government from seeking indemnification for liability caused by the acts of permittees on their property.

1. The City's Indemnification Provision Is Consistent With Similar Provisions Upheld By Other Circuits And Those Utilized By The National Park Service And General Services Administration

The panel's determination directly conflicts with other Circuits which have upheld the constitutionality of similar indemnification provisions. *See Nationalist Movement v. City of York*, 481 F.3d 178 (3rd Cir. 2007) and *Jacobson v. Harris*, 869 F.2d 1172 (8th Cir. 1989) (upholding "hold harmless insurance policy"); *United States v. McFadden*, 71 F. Supp. 2d 962, 967 (W.D. Mo. 1999), *aff'd sub nom.*, *United States v. Nenninger*, 351 F.3d 340 (8th Cir. 2003).

The Third Circuit upheld an indemnification provision requiring a permittee "'to indemnify the City and hold the City harmless from any liability to any person resulting from any damage or injury occurring in connection with the permitted event

proximately caused by the action of the'" permittee. *Nationalist Movement v. City of York*, 481 F.3d at 186 fn. 9.

Likewise, the Eighth Circuit upheld the indemnification provision of the National Park Service (36 C.F.R. § 251.56(d)(1)) which provides that permit "[h]olders shall . . . indemnify the United States for any and all injury, loss, or damage, including fire suppression costs, the United States may suffer as a result of claims, demands, losses, or judgments caused by the holder's use or occupancy." *United States v. McFadden*, 71 F. Supp. 2d 962, 967 (W.D. Mo. 1999), *aff'd sub nom., United States v. Nenninger*, 351 F.3d 340 (8th Cir. 2003).

Moreover, the General Services Administration requires a permit for special events occurring on federal property, including, but not limited to federal courthouses, which provides that:

> "The licensee shall indemnify and save harmless the United States, Its agents and employees against any and all loss, damage, claim or liability whatsoever, due to the personal injury or death, or damage to property of others directly or indirectly due to the exercise by the licensee of the privilege granted by the licensee, or any act or omission of licensee, including failure to comply with the obligations of said license."

GSA website (http://contacts.gsa.gov/webforms.nsf/0/5AA6F6C0F599AE7C85256A79007C4020/$file/GSA3453.pdf).

As with all of these provisions, the Long Beach indemnification provision limits indemnification to liability the City might incur caused by the acts of the permittee in connection with the permitted event. Although the panel attempts to broaden the scope of the provision by reading it in conjunction with the permit application, such a broad reading is not supported. Indeed, the panel's determination turns on the phrase in the application that states that an "organization will hold the City harmless from liability caused by the *conduct* of the event." App. 58. This phrase does not broaden the Ordinance. By definition, "conduct" refers to those conducting the event – not third parties. *Merriam-Webster's Collegiate Dictionary* (10th ed. 2000) ("conduct . . . to lead from a position of command . . . to direct or take part in the operation or management of . . . "). Moreover, the ordinances approved by other Circuits, as well as the National Park Service and the General Services Administration's ordinances are susceptible to the same broad reading.

2. The City's Indemnification Provision Is Consistent With The Rulings Of This Court

This Court has never held that a City must bear all the costs when a group seeks to conduct a special event on public property. To the contrary, this Court has held that a City may issue reasonable time, place and manner regulations in order to "assure financial accountability for damage caused by . . . [an] event."

Thomas v. Chicago Park District, *supra*, 534 U.S. at 322; accord *Cox v. New Hampshire*, *supra*, 312 U.S. 569. The Long Beach indemnification provision is consistent with this significant governmental interest.

Moreoever, although this Court has not directly ruled on the constitutionality of an indemnification provision in a special event permit, this Court has indicated that indemnification is a legitimate governmental interest subject to a reasonable time, place and manner regulation. In *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316, this Court noted that "[t]he Park District may . . . deny an application for [a special event] permit . . . [if] the applicant has not tendered . . . [an] indemnification agreement . . . " (534 U.S. 316, 319 fn. 1) and held that "the object of the permit system (*as plainly indicated by the permissible grounds for permit denial*) is not to exclude communication of a particular content, but . . . to assure preservation of the park facilities, . . . , and to assure financial accountability for damage caused by the event." *Thomas v. Chicago Park District*, *supra*, 534 U.S. at 322 (emphasis added). *See also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 797, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) (White, dissenting) (although not addressed by the majority, the dissent indicates that indemnification is a constitutionally permissible time, place and manner regulation).

Furthermore, the Long Beach indemnification clause is consistent with *Forsyth County v.*

Nationalist Movement, *supra*, 505 U.S. 123. Unlike the situation in *Forsyth County*, *supra*, indemnification is only premised upon the actions of the permittee – not those observing the permittee. The panel's holding to the contrary is necessarily premised upon the incorrect assumption that the permittee is responsible for the reaction of the observers. Such a construction makes indemnification impossible and is not supported by *Forsyth County v. Nationalist Movement*, *supra*, 505 U.S. 123.

3. The Panel's Opinion Effectively Precludes The City's Significant Governmental Interest In Indemnification

As previously noted "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, *supra*, 491 U.S. at 795. The indemnification provision is straightforward and simply seeks indemnification for the "acts or omissions of [the] permittee." In concluding that the Ordinance can be broadly read to require indemnification for the actions of third parties, the panel "takes the concept of a facial challenge to the extremes, conjuring up all manner of hypothetical people who could be affected by the regulations, even though there's no real possibility that the rules will be applied in such a counterproductive manner." *Berger v. City of Seattle*, 569 F.3d 1029, 1062 (9th Cir. 2009) (Chief Judge Kozinski, dissenting).

As noted by Chief Judge Kozinski, "[o]nce judges start looking for imperfections, that is pretty much the end of the story – and the regulations [due to the fact that no] rules written by man can withstand such persnickety scrutiny." *Berger v. City of Seattle*, *supra*, 569 F.3d at 1061 (Chief Judge Kozinski, dissenting).

It is difficult to see how the indemnification provision could be re-written to withstand Ninth Circuit scrutiny. Lacking any guidance, governmental entities within the jurisdiction of the Ninth Circuit must now either (1) bear the cost of defending themselves in any and all lawsuits arising from the actions of a permittee in connection with a special event conducted on public property, (2) bear the cost of enacting and subsequently defending a new indemnification provision "in the next round of litigation" (*Berger v. City of Seattle*, *supra*, 569 F.3d at 1062 (Chief Judge Kozinski, dissenting)), or (3) scrap "special event" ordinances altogether and only allow events to be conducted on streets and sidewalks in accordance with applicable traffic regulations. *See Frisby v. Schultz*, *supra*, 487 U.S. 474. The latter option would, of course, preclude blocking off streets for parades and preclude groups from reserving a portion of a park for a large scale event. While the latter option is far from ideal, it may well be the only choice for small and cash-strapped cities that cannot afford the other options.

Accordingly, as in *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316, "[t]he prophylaxis achieved by [reading the indemnification provision so

broadly as to preclude indemnification is] ... far outweighed ... by the senseless prohibition of speech" resulting from the elimination of special event permits. *Thomas v. Chicago Park District*, *supra*, 534 U.S. at 325. Indeed, "rather than ... insisting upon a degree of ["meticulous specificity"][6] ... that is found in few legal arrangements," any violations should be addressed if and when they arise. *Id.*

II. Conclusion

The Ninth Circuit's opinion is contrary to the decisions of this Court and other Circuits addressing the same issues which are of great importance to every city, county, state, and the federal government. Therefore, it is respectfully requested that the City of Long Beach's Petition for Writ of Certiorari be granted.

Respectfully submitted,

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[6] *Grayned v. City of Rockford*, *supra*, 408 U.S. at 111.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LONG BEACH AREA PEACE NETWORK; DIANA MANN, *Plaintiffs-Appellees*, v. CITY OF LONG BEACH, a municipal corporation, *Defendant-Appellant.*	No. 05-55083 D.C. No. CV-04-08510-SJO ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted
February 16, 2007 – Pasadena, California

Filed April 15, 2008
Amended July 24, 2009

Before: Harry Pregerson, William A. Fletcher, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge William A. Fletcher;
Concurrence by Judge Berzon

COUNSEL

Randall C. Fudge, Long Beach City Attorney's Office, Long Beach, California, for the appellant.

Carol A. Sobel, Santa Monica, California, for the appellees.

ORDER

The opinion filed on April 15, 2008 and reported at 522 F.3d 1010 is amended as follows:

(1) At 522 F.3d at 1022, following the first citation sentence for *Ward v. Rock Against Racism*, insert the following sentence:

> *But see FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-30 (1990) (invalidating as an impermissible prior restraint a licensing ordinance regulating the use of private property).

(2) At 522 F.3d at 1022, at the end of the first paragraph, change the citation from "*Id.*" to "*Ward*, 491 U.S. at 795 n.5."

(3) In the last paragraph at 522 F.3d at 1023, after the citation sentence for *Ward*, insert the following text:

> The Supreme Court has cautioned that "this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.*

The panel has unanimously voted to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote to rehear the matter en banc. *See* Fed. R. App. P. 35(b). The petitions are DENIED. The court will not accept any further petitions for rehearing or rehearing en banc.

IT IS SO ORDERED.

OPINION

W. FLETCHER, Circuit Judge:

We review the constitutionality of § 5.60 of the City of Long Beach Municipal Code ("LBMC" or "Ordinance"). Appellees Long Beach Area Peace Network and Diana Mann (collectively "the Peace Network") challenged § 5.60 under the First Amendment after the City of Long Beach ("the City") sought payment of administrative fees associated with a march and rally held by the Peace Network on March 22, 2003. The district court held that § 5.60 in its entirety unconstitutionally restricts the right to free speech and permanently enjoined the City from enforcing it. We affirm in part and reverse in part.

We hold that five challenged features of § 5.60 are constitutional: (1) the provisions distinguishing between expressive activity and other activity; (2) the provision allowing the City Manager to impose conditions to meet stated purposes; (3) the provision

authorizing the City Manager to obtain proof of indigent status; (4) the provision authorizing the City Manager to require a permittee to obtain insurance; and (5) the provision authorizing criminal penalties for violations of the Ordinance. However, we hold that four other features are unconstitutional: (1) part of the provision defining "special events"; (2) the provision applicable to "spontaneous" events; (3) the hold-harmless and indemnification provision; and (4) the provisions authorizing waiver of permit fees and departmental services charges.

We remand to allow the district court to determine whether the unconstitutional provisions are severable from the remainder of § 5.60.

I. Background

As described by the district court, the Long Beach Area Peace Network is "an unincorporated, loosely organized group of peace activists without an office, organizational phone, organizational email or insurance." On February 15, 2003, before the beginning of the Iraq War, the Peace Network sponsored a protest march and rally in the City of Long Beach, California. In preparation for the event, Dr. Eugene Ruyle ("Ruyle"), a retired professor and Peace Network member, submitted an application for a "special event" permit, as required by § 5.60.020(A). Long Beach Municipal Code ("LBMC") § 5.60.020(A) (1999). After negotiating the march route with Ruyle, the City approved the permit.

The march was conducted on public streets along the route suggested by the City. The event concluded with a rally in Bixby Park, a public park in the City. Several elected officials, including a City Council member and a State Assembly member, participated in the rally. According to some estimates, between 1,000 and 1,500 people attended the event.

The permit application, signed by Ruyle in February 2003, provided that the Peace Network would "hold the City harmless from any liability caused by the conduct of the event"; that the "City will not be liable for any mishaps or injuries associated with the event"; and that "[f]ull responsibility for activities at the event will be assumed by [the Peace Network]." The application also provided that the Peace Network would "be responsible for all costs incurred by City departments for use of City personnel and/or equipment." After submitting the application, Ruyle wrote a letter to the City requesting a waiver of the permit application fee and the departmental services charges imposed under § 5.60. The City did not assess any fee or charges for the February event.

On March 20, 2003, approximately one month later, the United States launched an aerial assault on Baghdad. In anticipation of the assault, the Peace Network had already organized another march and rally, to be held on March 22. Ruyle had submitted a letter to the City on or about March 18 describing the anticipated "spontaneous" event. Section 5.60 defines a "spontaneous" event as one "occasioned by news or

affairs coming into public knowledge within five (5) days" of the event. *See* LBMC § 5.60.030(A)(5). A "spontaneous" event does not require a formal permit, but it does require twenty-four hours advance notice to the City. The City Manager may refuse permission to hold such an event, and may impose "reasonable time, place and manner restrictions." *See* LBMC § 5.60.030(B). An initial email from Ruyle to the City, sent two weeks earlier, had indicated that the Peace Network planned to ask for the closure of at least one lane of traffic for the march and to reserve a bandshell in Bixby Park for the rally. In his email, Ruyle estimated that the March event would be "at least twice as big" as the February march and rally.

In a letter addressed to Ruyle dated March 21, the City granted permission to conduct a march and rally on March 22. In the letter, the City imposed a number of conditions, including the route of the march and the location of the rally. The letter contained a summary of estimated departmental services charges for "Police," "Public Works," "Park, Recreation & Marine (Park Staff)," "Parks, Recreation & Marine Maintenance," "Space Permit Fee," and "Junipero Parking Lot." The total estimated charges were $7,041. The letter set forth a schedule of payments in four equal installments during the next year. Ruyle and other members of the Peace Network signed the last page of the letter under a heading reading "Conditions Accepted." As signed, this page contained a handwritten notation at the top, stating that the "signers reserve[d] the right to challenge the

total," but that they would pay the first of the four installments on March 22. Ruyle paid the first installment on March 22, in accordance with the handwritten notation.

The march on March 22 took slightly more than one hour, and the event concluded with an anti-war rally at Bixby Park. The district court found that approximately 1,000 people participated in the March event. According to Ruyle's declaration, in contrast to the pre-war rally at the park in February, no elected officials participated in the March anti-war rally.

As part of the March event, members of the Surfrider Foundation placed surfboards on the beach in the shape of a peace symbol. The display was visible to participants of the march as they walked near the beach. The display took place entirely on the beach, did not interfere with any vehicular or pedestrian traffic, and did not result in any damage to the beach. Following the event, the surfboards were removed from the beach.

In his initial email, Ruyle had stated that Peace Network planned to request a waiver of insurance and departmental services charges. In its March 21 letter granting the permit, the City waived the insurance requirement but did not waive event-related charges. As he had done after the February march and rally, Ruyle wrote a letter to the City after the March event asking for a waiver of charges. Ruyle states in his declaration that a city official gave "no other guidelines than simply to write the letter" to

ask for a waiver. The only material differences between Ruyle's requests for waivers of charges for the February and March events were descriptions of event-specific matters such as the march routes.

The City did not waive the departmental services charges for the March event. In April 2003, the City sent a letter to the Peace Network members whose signatures (or, in the case of Diana Mann, whose name had been signed by someone else) appeared at the bottom of the March 21 letter. The letter requested payment of $7,041, in the installments specified in the March letter. The total amount was exactly the same as the estimate contained in that letter. Part of the total included a charge of $1,500 for the use of the beach for the surfboard display. The City's April letter noted that the first check, which Ruyle had given to the City on March 22, had been misplaced. The letter asked that payment on that check be stopped and that a new check be written for that amount. Peace Network members did not write a new check or make any of the requested payments.

The City filed an action in state Superior Court against Diana Mann and the Peace Network members who had signed the agreement. The court granted judgment of $5,901 for the City. That amount excluded the $1,500 charge for the use of the beach for the surfboard display because, according to the Superior Court, that charge was "not sufficiently justified as to actual costs" and was "an improper restraint of expression."

The Peace Network then filed a "facial challenge" to § 5.60 in federal district court, seeking declaratory and injunctive relief, compensatory damages, and attorney's fees and costs. The complaint alleged that the City's "past, present and threatened future actions" violate the First Amendment. The district court concluded that the entirety of § 5.60 constitutes an unconstitutional restraint on speech and assembly and entered a permanent injunction prohibiting its enforcement. The City timely appealed.

After the district court's decision and after initial briefing was completed on appeal, we decided *Santa Monica Food Not Bombs v. City of Santa Monica* ("*Food Not Bombs*"), 450 F.3d 1022 (9th Cir. 2006), assessing the constitutionality of a similar ordinance in Santa Monica, California. We asked the parties to file supplemental briefs addressing our decision in *Food Not Bombs*.

II. Standard of Review

We review de novo the district court's holding of unconstitutionality. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 648 (9th Cir. 2006). We also review de novo the district court's determinations on mixed questions of law and fact that implicate the question of constitutionality. *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007). We generally review for clear error the district court's findings of fact. *Gaudiya Vaishnava Soc'y v. City & County of San Francisco*, 952 F.2d 1059, 1062 (9th

Cir. 1991) (as amended). However, we conduct an independent review of the facts for the "issues arising under the First Amendment." *Rosenbaum,* 484 F.3d at 1152.

III. Nature of the Challenge

The Peace Network's complaint asserts a facial challenge to § 5.60. As an initial matter, we conclude that the Peace Network has Article III standing to bring this challenge. Standing, in the constitutional sense, requires that plaintiffs establish (1) a "distinct and palpable" injury in fact (2) that is "fairly traceable" to the challenged provision and (3) that would "likely . . . be redressed" by a favorable decision for the plaintiff. *Allen v. Wright,* 468 U.S. 737, 750-51 (1984) (internal quotation marks omitted); *see Food Not Bombs,* 450 F.3d at 1033. Plaintiffs mounting a facial challenge to an ordinance may establish standing by alleging that they have "modified [their] behavior" as a result of the ordinance, such as "by choosing locations other than [the areas subject to the ordinance]." *Id.* at 1034. A plaintiff "need not apply for a benefit conditioned by a facially unconstitutional law," *United States v. Baugh,* 187 F.3d 1037, 1041 (9th Cir. 1999), but must demonstrate a "serious[] interest[] in subjecting [it]self to" the challenged measure, and must demonstrate that "the defendant [is] seriously intent on enforcing[] the challenged measure," *NAACP v. City of Richmond,* 743 F.2d 1346, 1351 (9th Cir. 1984).

The Peace Network organized two separate events covered by § 5.60. The City assessed departmental services charges against the Peace Network for the second event and brought suit in state court to obtain payment. The Peace Network has provided evidence that it has modified its behavior as a result of § 5.60 by declining to hold such events in Long Beach in the future because of the City's enforcement of the Ordinance. *See Food Not Bombs,* 450 F.3d at 1034. The Peace Network states that if the permanent injunction against the enforcement of § 5.60 is upheld, it will hold expressive events in Long Beach. The Peace Network has thus established injury in fact that is fairly traceable to § 5.60 and that is likely to be redressed if its First Amendment suit is successful.

The Peace Network claims that several provisions of the LBMC "allegedly vest[] unbridled discretion in a government official over whether to permit or deny expressive activity." *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 755-56 (1998). There are two primary rationales for allowing this type of facial challenge.

> First, the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. . . . Second, the absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate

> denial of a permit and its illegitimate abuse of censorial power.

Id. at 757-58; *see also S. Or. Barter Fair v. Jackson County,* 372 F.3d 1128, 1134-35 (9th Cir. 2004). Hence, "[f]acial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision." *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 133 n.10 (1992). The Court wrote in *Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1940) (citations omitted):

> [T]he rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor . . . is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is . . . the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. . . . Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.

To assert this type of facial challenge, a plaintiff must meet two requirements. First, a plaintiff must

satisfy the standing requirements of Article III by showing that the challenged provision or provisions apply to its conduct. *Members of City Council of L.A. v. Taxpayers for Vincent,* 466 U.S. 789, 798 (1984) ("Such holdings invalidated entire statutes, but did not create any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court."). As noted above, the Peace Network has Article III standing.

Second, the challenged ordinance "must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *City of Lakewood,* 486 U.S. at 759. We conclude that § 5.60 has a sufficient nexus to expression to satisfy the second requirement. Section 5.60 governs use of the traditional public fora of public streets, sidewalks, and parks. Indeed, some of the provisions specifically apply to persons engaged in "expressive activity." *See, e.g.,* LBMC § 5.60.040(B) ("[Special event permit] applications for expressive activities [involving the use of city streets, sidewalks, or parks] shall be filed in accordance with subsection D of this section."). The Peace Network has engaged in, and seeks to engage in, public marches and rallies on the streets, sidewalks, and parks of Long Beach. "[M]ass gatherings [to show support for a cause] bear a sufficient nexus to conduct commonly associated with expression." *S. Or. Barter Fair,* 372 F.3d at 1136. Section 5.60 regulates those mass gatherings and therefore has a

"close connection to expression" because it "regulates conduct which is itself protected speech." *See Gaudiya Vaishnava Soc'y,* 952 F.2d at 1062-63.

We therefore conclude that the Peace Network has satisfied the additional requirements to raise a facial challenge on unbridled discretion grounds.

IV. General Considerations

The First Amendment prohibits Congress from enacting laws "abridging the freedom of speech, . . . or the right of the people peaceably to assemble." U.S. Const. amend. I. The Supreme Court has extended the protection of the First Amendment to the states. *Edwards v. South Carolina,* 372 U.S. 229, 235 (1963); *Thornhill,* 310 U.S. at 95; *Hague v. C.I.O.,* 307 U.S. 496, 512 (1939). Three types of speech regulation are presumptively invalid: regulations on speech protesting government action, regulations affecting speech in a traditional public forum, and prior restraints. By meeting certain criteria, content-neutral time, place and manner restrictions may overcome the presumption of invalidity.

A. Presumptively Invalid Regulations

1. Regulation of Speech Protesting Government Action

We have recognized that certain types of speech enjoy special status. *See, e.g., Nat'l Adver. Co. v. City of Orange,* 861 F.2d 246, 248 (9th Cir. 1988) ("The

first amendment affords greater protection to non-commercial than to commercial expression."). Political speech is core First Amendment speech, critical to the functioning of our democratic system. The Peace Network's protest of the United States military action in Iraq is the type of speech that "rest[s] on the highest rung of the hierarchy of First Amendment values." *See Carey v. Brown,* 447 U.S. 455, 467 (1980); *see also Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *Thornhill,* 310 U.S. at 95 ("Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion.").

The Supreme Court has recognized that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 907 (1982) (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley,* 454 U.S. 290, 294 (1981)); *see also Edwards,* 372 U.S. at 235 (stating that peaceable assembly at the site of the state government to protest government action is the "most pristine and classic form" of exercising First Amendment rights). In *United States v. Baugh,* we wrote that the First Amendment "applie[d] with particular force" to a

"march and other protest activities." 187 F.3d at 1042; *see also Am.-Arab Anti-Discrimination Comm. v. City of Dearborn,* 418 F.3d 600, 611 (6th Cir. 2005) ("[P]arades and processions are a unique and cherished form of political expression, serving as a symbol of our democratic tradition. There is scarcely a more powerful form of expression than the political march."). We have also noted the importance of timely opportunity to express political views by staging a political march. *City of Richmond,* 743 F.2d at 1356 ("[T]iming is of the essence in politics. . . . [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all. A delay of even a day or two may be intolerable when applied to political speech in which the element of timeliness may be important." (internal quotation marks and citation omitted; alterations in *City of Richmond*)).

2. Regulation of Speech in Traditional Public Fora

The Supreme Court has established different levels of scrutiny for analyzing alleged First Amendment violations, depending on where the speech takes place. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983). In traditional public fora, "the government's ability to permissibly restrict expressive conduct is very limited." *United States v. Grace,* 461 U.S. 171, 177 (1983). In such locations, First Amendment protections are strongest and regulation is most suspect. *Grossman v. City of Portland,* 33 F.3d 1200, 1204 (9th Cir. 1994). "Public

fora have achieved a special status in our law; the government must bear an extraordinarily heavy burden to regulate speech in such locales." *City of Richmond,* 743 F.2d at 1355.

"Public open spaces" such as parks are distinguished from streets because their use for expressive activities rarely implicates other important governmental interests. *Food Not Bombs,* 450 F.3d at 1042. Public parks and sidewalks "are uniquely suitable for public gatherings and the expression of political or social opinion." *ACORN v. City of Phoenix,* 798 F.2d 1260, 1267 n.5 (9th Cir. 1986). Courts have recognized a somewhat greater governmental interest in regulating expressive activity on city streets because of the public safety concerns raised by vehicular traffic. *Id.* at 1267. Nonetheless, we have rejected the proposition that "the Supreme Court's designation of streets as public fora" is limited to "sidewalks and other locales traditionally reserved for public communication." *Id.* at 1266. The Supreme Court has recognized that "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz,* 487 U.S. 474, 481 (1988).

Traditional public fora gain even more importance when they are host to core First Amendment speech. *See, e.g., Hague,* 307 U.S. at 515-16. In *Grossman v. City of Portland,* we explained that the "venerable tradition of the park as a public forum has – as suggested by the attendant image of the speaker

on a soapbox – a very practical side to it as well: parks provide a free forum for those who cannot afford newspaper advertisements, television infomercials, or billboards." 33 F.3d at 1205. Government restrictions on the use of public places such as streets, sidewalks, and parks risk placing speech on topics of public importance within the purview of only the wealthy or those who enjoy the support of local authorities. *See id.* at 1205 n.8; *City of Richmond,* 743 F.2d at 1356 (calling for careful examination of restrictions "when their effects fall unevenly on different . . . groups in society").

Section 5.60 requires a permit for "special events" on all public property within the City of Long Beach, including streets, sidewalks, and public parks. *See* LBMC § 5.60.020(A). "Special events" include parades, demonstrations, and assemblies of any size on public streets and sidewalks if they do not comply with applicable traffic regulations; organized assemblages of seventy-five or more people in public places; and other organized activities involving seventy-five or more persons involving the use of, or having an impact on, public property or facilities. LBMC § 5.60.010(I)(1)-(3); Long Beach Administrative Regulation ("AR") 8-28(IV)(A)(2) (2007). To the extent that the Ordinance regulates the use of public parks, sidewalks, and streets we analyze its provisions under the standard for traditional public fora.

3. Regulation by Prior Restraint

Prior restraints on speech are disfavored and carry a "heavy presumption" of invalidity. *Forsyth County,* 505 U.S. at 130. "This heavy presumption is justified by the fact that 'prior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights.'" *Grossman,* 33 F.3d at 1204 (alteration in *Grossman*) (quoting *Neb. Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1975)); *accord Rosen v. Port of Portland,* 641 F.2d 1243, 1246-47 (9th Cir. 1981). The Supreme Court explained in *Ward v. Rock Against Racism,* "[T]he regulations we have found invalid as prior restraints have 'had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.'" 491 U.S. 781, 795 n.5 (1989) (quoting *Se. Promotions Ltd. v. Conrad,* 420 U.S. 546, 553 (1975)). *But see FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-30 (1990) (invalidating as an impermissible prior restraint a licensing ordinance regulating the use of private property). A prior restraint need not actually result in suppression of speech in order to be constitutionally invalid. "The relevant question [in determining whether something is a prior restraint] is whether the challenged regulation *authorizes* suppression of speech in advance of its expression. . . ." *Ward*, 491 U.S. at 795 n.5.

In *Grossman,* we noted that a permitting ordinance that required a written application before users could hold an organized demonstration in a public park did not fit entirely within "classic prior

restraint cases." 33 F.3d at 1205 n.9 (internal quotation marks and citation omitted). But we held nevertheless that the permitting system still bore "a heavy presumption against its constitutional validity." *Id.* at 1204 (internal quotation marks omitted); *see also Forsyth County,* 505 U.S. at 130 (applying a "'heavy presumption'" against validity of a regulation imposing advance fees on parades and assemblies held on public property because it was a "prior restraint" on speech). Section 5.60 is similar to the permitting system in *Grossman,* though it reaches a broader range of conduct. Section 5.60 regulates not only expressive activity in parks located in Long Beach, but also any activity on public streets, sidewalks, and right-of-ways. *See* LBMC § 5.60.010(I)(1). Section 5.60 even regulates events that "involve[ ] the use of, or ha[ve] an impact on, public property or facilities" if such activities are "likely to require the provision of [enumerated] city services." *Id.* § 5.60.010(I)(3); AR 8-28(IV)(A).

B. Reasonable Time, Place and Manner Restrictions

"[R]easonable time, place, [and] manner restrictions" on speech are permissible. *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 293 (1984). Such restrictions can include permitting requirements for core First Amendment speech in traditional public fora, *id.,* and they are permissible if they satisfy four criteria. As the Supreme Court wrote in *Clark,* "We have often noted that restrictions of this kind are

valid provided [1] that they are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information." *Id.* (bracketed numbers added). In *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992), the Court recognized a fourth criterion: a permitting scheme "may not delegate overly broad licensing discretion to a government official."

The first criterion is that the restriction be content-neutral. That is, the restriction must be based on something other than the content of the speech. *Grace,* 461 U.S. at 177. A law is content-based rather than content-neutral if "the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face." *ACLU of Nevada v. City of Las Vegas,* 466 F.3d 784, 793 (9th Cir. 2006). Though "an improper censorial motive" is sufficient, such a motive is not necessary to render a regulation content-based. *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.,* 502 U.S. 105, 117 (1991). If a regulation "distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed," it is content-based. *Foti v. City of Menlo Park,* 146 F.3d 629, 636 (9th Cir. 1998) (internal quotation marks omitted).

A content-based regulation is generally subject to strict scrutiny. The government therefore "must show

that its regulation is necessary to serve a compelling state interest," *Perry Educ. Ass'n,* 460 U.S. at 45, and that the regulation uses "the least restrictive means to further the articulated interest," *Foti,* 146 F.3d at 636. "[A] *content-based* restriction on *political speech* in a *public forum* . . . must be subjected to the most exacting scrutiny." *Boos v. Barry,* 485 U.S. 312, 321 (1988).

Under the second criterion, the government must show: (1) that the governmental interest is substantial and "unrelated to suppression of expression," *Baldwin v. Redwood City,* 540 F.2d 1360, 1365 (9th Cir. 1976); and (2) that the regulation is narrowly tailored to meet that interest, *Ward,* 491 U.S. at 797.

The first aspect is substantial governmental interest. The Supreme Court has recognized substantial governmental interests in regulating competing uses of public fora, *Forsyth County,* 505 U.S. at 130, in maintaining parks in an "attractive and intact condition," *Clark,* 468 U.S. at 296, in regulating "streets to protect and insure the safety, comfort, or convenience of the public," *Murdock v. Pennsylvania,* 319 U.S. 105, 116 (1943), and in collecting nominal fees to "defray the expenses of policing" the regulated activity, *id.* at 113-14. We have also recognized as a substantial governmental interest the need to "provide notice to the municipality of the need for additional public safety and other services." *Food Not Bombs,* 450 F.3d at 1042. Although the public safety interests in regulating street use are substantial, "those interests must give way on occasion to the

temporary dedication of the streets to picketing and parading." *ACORN,* 798 F.2d at 1267 n.5.

Three questions guide courts in analyzing narrow tailoring, the second aspect. First, does the regulation achieve its ends without restricting substantially more speech than necessary? This "requirement . . . is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward,* 491 U.S. at 799 (quoting *United States v. Albertini,* 472 U.S. 675, 689 (1985)) (second alteration in *Ward*). The Supreme Court has cautioned that "this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* Expansive language can signal the absence of "a close fit with the governmental interests underlying the permitting requirement." *Food Not Bombs,* 450 F.3d at 1040-42 (comparing a restriction that applies if an activity "may" implicate a governmental interest with a restriction that applies if the activity is "likely" to affect the interest). Second, are there obvious alternatives that would achieve the same objectives with less restriction of speech? A city is not required to select the least restrictive alternative, but "an assessment of alternatives can still bear on the reasonableness of the tailoring." *Menotti v. City of Seattle,* 409 F.3d 1113,

1131 n.31 (9th Cir. 2005); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). Third, is a generic regulation needed "as applied to other speakers," even if it is not needed in the case at hand? *Galvin v. Hay*, 374 F.3d 739, 753 (9th Cir. 2004). This question addresses "[t]he multiplied effect of" a particular expressive activity "if many other organizations likewise decided to engage in this activity on a pervasive or regular basis." *ACORN*, 798 F.2d at 1270; *see also Clark*, 468 U.S. at 296-97.

The third criterion applicable to time, place and manner restrictions is that regulations "must leave open ample alternatives for communication." *Forsyth County*, 505 U.S. at 130. Several considerations are relevant to this analysis. First, "[a]n alternative is not ample if the speaker is not permitted to reach the intended audience." *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (internal quotation marks omitted); *see also Menotti*, 409 F.3d at 1138. Second, if the location of the expressive activity is part of the expressive message, alternative locations may not be adequate. *Galvin*, 374 F.3d at 756; *ACORN*, 798 F.2d at 1267 n.5. Third, we consider the opportunity for spontaneity in determining whether alternatives are ample, particularly for political speech. *City of Richmond*, 743 F.2d at 1356. Fourth, we consider the cost and convenience of alternatives. *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994).

Finally, the fourth criterion is the prohibition on regulations that confer unbridled discretion on a permitting or licensing official. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150-51 (1969). Regulations must contain "narrow, objective, and definite standards to guide the licensing authority," *id.*, and must require the official to "provide [an] explanation for his decision," *Forsyth County,* 505 U.S. at 133. The standards must be sufficient to "render [the official's decision] subject to effective judicial review." *Thomas v. Chi. Park Dist.,* 534 U.S. 316, 323 (2002). This requirement applies to an official's "authority to condition the permit on any additional terms" not stated in the ordinance. *City of Lakewood,* 486 U.S. at 772.

V. Analysis of § 5.60

A. Description of the Ordinance

Section 5.60 requires groups to obtain city-issued permits in order to hold "special events" as defined in the Ordinance.[1] LBMC § 5.60.020(A). Permits for

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[1] The City has asked us to take judicial notice of the Santa Monica ordinance and the City's recent amendment to § 5.60 concerning the definition of special events. We agree to take judicial notice of the Santa Monica ordinance. *See Food Not Bombs,* 450 F.3d at 1025 n.2 (citing *Newcomb v. Brennan,* 558 F.2d 825, 829 (7th Cir. 1977)). We also agree to take judicial notice of the new definition of special events contained in subsection .010, as interpreted by Long Beach Administrative Regulation AR 8-28, promulgated on February 7, 2007. *Id.* at 1031-32; *see also City of Lakewood,* 486 U.S. at 770 (describing

(Continued on following page)

special events not involving expressive activity require at least sixty days advance notice to the City. By contrast, permits for special events involving expressive activity require between three and ten days advance notice, depending on the location of the planned event. *Id.* § 5.60.040. Certain events are exempt from the special event permit requirement. Those events include funeral processions; activities conducted by governmental agencies; filming activities governed by another provision of the municipal code; and "spontaneous parades, assemblies or demonstrations involving expressive activity" occasioned by events coming into public knowledge within five days of the event. *Id.* § 5.60.030(A).

The City Manager "shall" grant a permit for a special event if certain criteria are satisfied. *Id.* § 5.60.040(J)(1)-(13). The City Manager "may" deny or revoke a permit if certain other criteria are satisfied. *Id.* § 5.60.070(A)(1)-(15), (B). A permittee must agree to hold harmless and indemnify the City and its officers and employees against a broad range of claims and harms, and must, under certain circumstances, obtain insurance. *Id.* § 5.60.080. A permittee must pay both a permit fee and "departmental

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the requirements for an administrative regulation to affect constitutional analysis). As we stated in *Food Not Bombs*, "[w]e review only the present version of the ordinance and implementing regulations." 450 F.3d at 1025. We also note that in an order filed on January 23, 2007, this court granted the City's motion to take judicial notice of Chapter VII of the Chicago Park District Code.

services charges" to the City unless they are funded or waived by the City Council. *Id.* §§ 5.60.050, 5.60.090.

Departmental services charges are "the actual costs which a department of the city incurs in connection with activities for which a permit is required," including

> costs associated with fire safety, traffic and/or pedestrian control, water safety, the closure of streets or intersections, the diverting of traffic, the salaries of city personnel involved in administration or coordination of city services for the event, the cost to the city to provide support personnel, equipment, materials and supplies, and related city costs such as fringe benefits or employee overtime.

Id. § 5.60.010(C). Departmental services charges do not include "costs incurred by the city to provide police protection to those engaged in 'expressive activity.'" *Id.* However, other costs associated with expressive activities – beyond those associated with "police protection" – are included in departmental services charges.

"Spontaneous" events are exempt from the permitting requirement applicable to special events. An organizer of a spontaneous event must provide at least twenty-four-hour advance notice to the City. *Id.* § 5.60.030(A)(5). The City Manager may impose "reasonable time, place and manner restrictions" on a spontaneous event. *Id.* § 5.60.030(B). Further, the

City Manager may deny permission to hold a spontaneous event, based on the same criteria applicable to permits for special events. *Id.* §§ 5.60.030(C), 5.60.070. An organization holding a spontaneous event is not required to pay the permit application fee applicable to special events. *Id.* §§ 5.60.040(F), 5.60.030(A)(5). However, that organization may be required to pay departmental services charges unless those charges are funded or waived by the City Council.

The Peace Network challenges nine features of § 5.60, appearing in a number of subsections of the Ordinance. We first address five features that we hold are constitutional. We then address four features that we hold are unconstitutional in whole or in part.

B. Constitutional Features of § 5.60

1. Expressive Activity Distinctions

The Peace Network argues that certain provisions distinguishing between "expressive activity" and other activity are impermissibly content-based because they provide for differential treatment of activities based on the messages those activities seek to convey.

"'Expressive Activity' means conduct, the sole or principal object of which is the expression, dissemination or communication by verbal, visual, literary or auditory means of opinion, views or ideas. Expressive activity includes, but is not limited to,

public oratory and the distribution of literature." *Id.* § 5.60.010(D). It is true that some provisions of § 5.60 distinguish between expressive and non-expressive activity. *E.g., id.* § 5.60.010(C) (prohibiting the City Manager from imposing departmental services charges for costs incurred by the City to provide police protection to people engaged in expressive activity); *id.* § 5.60.020(D) (prohibiting the City Manager from imposing conditions on permits "in a manner that will unreasonably restrict expressive or other activity protected by the California or United States constitutions"); *id.* § 5.60.040(G) (requiring the City Manager to act on completed applications for permits involving expressive activities within two business days, to provide the applicant with written notice explaining the reasons for any denial or conditional approval, and to consult with the city attorney before denying or conditionally approving a permit involving expressive activity).

However, we conclude that these distinctions between expressive activities and non-expressive activities are permissible. These subsections of § 5.60 are "justified without reference to the content of the regulated speech." *See Clark,* 468 U.S. at 293. These subsections do not show that the City has "adopted [the] regulation of speech because of disagreement with the message it conveys." *See Ward,* 491 U.S. at 791. Here, the opposite is true, for "the permissive nature of the [exceptions favoring expressive activity] furthers, rather than constricts, free speech." *See Thomas,* 534 U.S. at 325. All of the provisions

"treat[] expressive events more favorably than others." *Food Not Bombs,* 450 F.3d at 1037; *cf. Burk v. Augusta-Richmond County,* 365 F.3d 1247, 1254-55 (11th Cir. 2004) (finding an ordinance restricting public gatherings to be unlawfully content-based because it was "directed only to communicative activity, rather than to all activity, and its applicability turn[ed] *solely* on the subject matter of what a speaker might say").

Further, the Ordinance does not "single[] out certain speech for differential treatment based on the idea expressed," *see ACLU of Nevada,* 466 F.3d at 794 (internal quotation marks omitted), and it does "not distinguish *among* the expressive events based on their content," *see Food Not Bombs,* 450 F.3d at 1037. Identifying "expressive activity" protected by the First Amendment can sometimes be difficult. *See, e.g., Texas v. Johnson,* 491 U.S. 397, 399 (1989) (holding, in a 5-4 decision, that flag burning is protected activity under the First Amendment). But such difficulty arises from the nature of the constitutionally protected speech and the heightened protection provided by the First Amendment. *See, e.g., Murdock,* 319 U.S. at 115 ("A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the . . . merchandise of . . . peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of . . . speech . . . [is] in a preferred position."). It does not follow that those subsections of § 5.60 that treat expressive activity

more favorably than non-expressive activity are impermissibly content-based. Indeed, we recently held in *Food Not Bombs* that comparable provisions of Santa Monica's ordinance, distinguishing between "expressive" and "non-expressive" events, were permissible. 450 F.3d at 1037. Following *Food Not Bombs,* we so hold for these subsections of 5.60 as well.

2. Conditions on Permits for Special Events

The Peace Network argues that § 5.60.020(D) gives the City Manager unbridled discretion to impose conditions on permits to hold special events. We disagree. This subsection allows the City Manager to impose conditions on permits only to achieve specified purposes. It provides:

> The city manager may condition any permit . . . with *reasonable requirements* concerning the time, place or manner of holding such event *as is necessary to coordinate multiple uses of public property, assure preservation of public property and public places, prevent dangerous, unlawful or impermissible uses, protect the safety of persons and property and to control vehicular and pedestrian traffic in and around the venue,* provided that such requirements shall not be imposed in a manner that will unreasonably restrict expressive or other activity protected by the California or United States constitutions.

LBMC § 5.60.020(D) (emphasis added). The subsection then goes on to provide a non-exhaustive list of conditions that the City Manager may impose to achieve these specified purposes. These conditions include "accommodation of an event's pedestrian and vehicular traffic, including restricting events to city sidewalks, portions of a city street, or other public right-of-way," "provision of a waste management plan, and the clean up and restoration of the site of the event," and "reasonable designation of alternate sites, times, dates, or modes for exercising expressive activity." *Id.* § 5.60.020(D)(2), (9), (13).

The purposes specified in § 5.60.020(D) for imposing conditions on permits are objective and relatively precise, and have no discernable connection to the content of any particular message. *Compare City of Lakewood,* 486 U.S. at 753-54, 770 (striking down as allowing unbridled discretion a city ordinance allowing the mayor to impose "any other terms and conditions deemed necessary and reasonable" (internal quotation marks omitted)), *with United States v. Linick,* 195 F.3d 538, 541 (9th Cir. 1999) (upholding a law allowing imposition of "terms and conditions as the authorized officer deems necessary to . . . otherwise protect the public interest" (alteration in original; internal quotation marks omitted)). Further, the subsection authorizes only "reasonable requirements" that are "necessary" to serve the specified purposes, and provides that any such requirements must not "unreasonably restrict" expressive activity. *See Menotti,* 409 F.3d at 1145 n.63; *S. Or. Barter Fair,*

372 F.3d at 1139-41. We also note that § 5.60.040(G) requires the City Manager to consult with the City Attorney and to provide to an applicant a written explanation for a decision that imposes conditions on the permit. *See* LBMC § 5.60.040(G). Finally, we note that §§ 5.60.130(A) and .040(E) allow, in the alternative, a direct appeal of a permitting decision to either the City Council or state court.

We therefore conclude that § 5.60.020(D) does not confer "unbridled discretion" on the permitting authority to impose conditions in violation of the First Amendment. Although the provision has survived this facial challenge, it might nonetheless be vulnerable to an as-applied challenge if, in its implementation, there emerged "a pattern of unlawful favoritism," *see Thomas,* 534 U.S. at 324-25; *see, e.g., Shuttlesworth,* 394 U.S. at 156-59; *Cox v. New Hampshire,* 312 U.S. 569, 575-77 (1941), or if it resulted in an impermissibly burdensome time, place or manner restriction, *see, e.g., Galvin,* 374 F.3d at 747 n.5, 752-56; *One World One Family Now v. City & County of Honolulu,* 76 F.3d 1009, 1012 (9th Cir. 1996).

3. Proof of Indigent Status

The Peace Network also challenges as allowing unbridled discretion § 5.60.050(B), which allows the City Manager to require "relevant information and documentation as may, in the opinion of the city manager or his/her designee, be reasonably necessary

to verify" the indigent status of a person.[2] The validity of § 5.60.090(E), which imposes departmental services charges on a permittee unless he or she qualifies as an "indigent natural person," depends in part on the constitutionality of subsection .050(B). LBMC §§ 5.60.050(B), .090(E).

Section 5.60.050(B) defines an "indigent natural person" to include any person who is "eligible for county relief and support" under the California Welfare and Institutions Code, but the definition "is not limited to" such persons. *Id.* § 5.60.050(B). An indigent natural person who desires to engage in expressive activity may request a waiver of the permit application fee imposed by subsection .050.[3] *Id.* We conclude that the eligibility provision does not confer unbridled discretion on the City Manager.

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[2] The Peace Network's other challenge to § 5.60.050 addresses the provision that a permit applicant must pay a fee that is established by the City Council through a resolution unless the City Council waives the fee. We address the waiver provision in Part V.C.4, *infra*, regarding fees and departmental services charges.

[3] The term "indigent natural person" is used in the same fashion in LBMC § 5.60.090(E). That section imposes departmental services charges on permittees unless they qualify as an "indigent natural person." *See* LBMC § 5.60.090(E). We reach the same conclusion under that provision as we do here: The City Manager's ability to request "relevant information and documentation" to prove indigent status does not give the public official unbridled discretion.

First, the definition of indigency based on the California Welfare and Institutions Code is content-neutral and objective. Section 5.60.050(B) allows the City Manager to determine which "relevant information and documentation" is "reasonably necessary to verify [indigency] status." *Id.* § 5.60.050(B). But the documentation requirements do not affect the definition of indigency. Rather, they merely give flexibility to the City Manager in determining whether a particular applicant has satisfied the criteria of the definition. We do not regard this flexibility as providing the sort of unbridled discretion that would invalidate the section. A person's indigent status is not always readily ascertainable. Proof of such status may come in many forms, depending on the circumstances of the applicant. Coupled with this array of potential forms of proof is the City's interest in verifying that an applicant requesting a fee waiver is indeed indigent. The Ordinance, which limits the City to "relevant information" that is "reasonably necessary," adequately ensures that the choice of means of proof is not left to the "whim" of the City Manager. *Id.* § 5.60.050(B); *cf. S. Or. Barter Fair*, 372 F.3d at 1139.

Requiring additional limitations governing the type of documentation the City Manager may request as proof of indigency would be, in the words of Justice Scalia, "insisting upon a degree of rigidity that is found in few legal arrangements." *See Thomas*, 534 U.S. at 325. Moreover, the indigency provisions are designed to "further[], rather than constrict[], free speech," *see id.*, and therefore should be construed

favorably in the absence of evidence of a pattern of abuse.

The Peace Network makes a related challenge to the indigency exception, contending that the definition of indigent natural person, which "is not limited to" a person eligible for county relief, vests the City Manager with unbridled discretion to decide who else may qualify for the exemption. We disagree. Indigency is a common term with a well understood definition. One may disagree, within certain limits, about the level of income or assets needed to qualify as an indigent under the Ordinance, but the disagreement will be in a fairly narrow range. Further, the Ordinance has given a baseline in specifying that persons "eligible for county relief" qualify as indigent. We therefore conclude that the definition of indigent natural person does not confer unbridled discretion. Like the documentary provisions, the expansive definition is designed to further, rather than to restrict, free speech and therefore should be construed favorably.

We also note that if the application is denied, the City Manager must provide the applicant with a statement explaining the reasons for denial. LBMC § 5.60.070(C). The applicant has the opportunity to appeal the denial to the City Council, *id.* § 5.60.130(A), or, if the applicant has applied for a special event permit fewer than thirty days before the event, directly to state court, *id.* § 5.60.040(E). For these reasons, the proof of indigency provision does

not give the City Manager unbridled discretion in violation of the First Amendment.

4. Insurance Requirement

Section 5.60.080(B) provides that permittees must "procure and maintain [an insurance policy] in full force and effect during the term of the permit." The Peace Network argues that this provision is content-based and allows public officials to exercise unbridled discretion. We disagree.

Section 5.60.080(C) authorizes the City Manager to waive the insurance requirement if he determines that the planned event does not present a "substantial or significant public liability or property damage exposure for the city or its officers[.]" Further, § 5.60.080(D) provides an exception to the insurance requirement, stating that it "shall not be construed to apply to parades or special events . . . involving expressive activity which enjoy protection under the United States or California constitutions[.]" To qualify for this exception, such

> parades or special events shall be required to either: (1) agree to indemnify, protect, defend and hold harmless the city, its officers and employees against all claims, damages, expenses, loss or liability of any kind or nature whatsoever arising out of, or resulting from, the alleged acts or omissions of permittee, its officers, agents or employees in connection with the permitted parade, event or activity; or (2) agree to redesign or

> reschedule the permitted event to respond to specific risks, hazards and dangers to the public health and safety identified by the city manager as being reasonably foreseeable consequences of the permitted parade or special event[.]

Id.

In *Food Not Bombs,* we examined Santa Monica's similar insurance requirement. 450 F.3d at 1056-57 (Kleinfeld, J., writing for the majority); *id.* at 1049-52 (Berzon, J., dissenting in part). The Santa Monica ordinance required permittees to obtain insurance "that the Risk Manager determines to be necessary and adequate under the circumstances" for demonstrations and parades. *Id.* at 1028 (Berzon, J., maj. op.) (internal quotation marks omitted). The ordinance exempted expressive events from the insurance requirement, so long as the organizers indemnified the city, "unless there is a specific, demonstrable history of personal injury or property damage claims being awarded against the applicant attributable to the applicant's conduct of previous events in the City that are similar in nature to the proposed event." *Id.* (internal quotation marks omitted).

The majority of the panel upheld the insurance requirement, concluding that it was content-neutral. *Id.* at 1057 (Kleinfeld, J., writing for the majority). Judge Berzon, writing for herself, would have struck down the requirement as content-based. *Id.* at 1051-52 (Berzon, J., dissenting in part). The majority observed that

> [p]olitical demonstration organizers can . . . avoid . . . the insurance provision if they cooperate with the City Manager to design the event "to respond to specific risks, hazards and dangers to the public health and safety identified by the City Manager . . . as being reasonably foreseeable consequences of the permitted event." Thus, most demonstration organizers will not have to provide insurance and even those with a destructive history can avoid the insurance requirement if they choose to work with the City Manager to avoid repetition of past injuries or property damage.

Id. at 1057 (footnote and citation omitted).

The Peace Network argues that by authorizing the Long Beach City Manager to determine whether insurance is required, the Ordinance requires the City Manager to evaluate the content of the message that is conveyed. While we conclude below that the indemnification provision in § 5.60.080(A), which applies to "[e]ach permit," is invalid in the sense that the City may not require a permit applicant to provide indemnification, we conclude that a city may authorize a permit applicant to provide, at the applicant's option, indemnification as an alternative to insurance. Moreover, Long Beach leaves permit applicants with another alternative if they wish to hold their planned event – they may redesign the event. We see nothing to distinguish the LBMC insurance requirement from the insurance requirement we upheld as content-neutral in *Food Not*

Bombs. The redesign language in § 5.60.080(D) is nearly identical to the language of the alternative evaluated in *Food Not Bombs*. Therefore, because a "valid . . . alternative" exists, "the insurance provision . . . present[s] no constitutional problem." *Food Not Bombs*, 450 F.3d at 1049-50; *cf. id.* at 1049-50 (Berzon, J., dissenting in part) (stating that with a valid indemnification alternative the insurance provision at issue "would present no constitutional problem").

The Peace Network also argues that § 5.60.080(D) gives the City Manager unbridled discretion to impose or waive insurance requirements. However, the subsection states that the insurance provision "shall not be construed to apply" to expressive activities that qualify for the exemption. The words "shall not" do not connote discretion to require insurance for parades and special events involving expressive activities. If the availability of the exemption is triggered because the event involves expressive activity, there are three alternatives: indemnification (which we hold invalid), redesign of the event, or insurance. The Ordinance does not specify who selects between these available options. *See* LBMC § 5.60.080(D). The commonsense reading of this subsection is that the applicant seeking to hold a parade or special event that involves expressive activity may select between the alternatives.

Section 5.60.080(C) is a logical extension of the second alternative in subsection (D). If there is no need to redesign or reschedule an expressive event

because it poses no substantial risk of public liability or property damage, then the City Manager can waive the insurance requirement altogether. We read the mandatory language of subsection (D) in conjunction with the permissive language of subsection (C) to require the City Manager to waive the insurance requirement if the event does not present a substantial risk of public liability or property damage, thereby obviating any need to redesign or reschedule the event. It would be absurd to require the City Manager to propose that the event be redesigned or rescheduled in situations where the change is not necessary because the event poses minimal risks of public liability in the first place. Based on this commonsensical reading of the statute, we conclude that the insurance waiver provision provides the City Manager with content-neutral, objective factors which control and direct the City Manager's decision whether to grant a waiver.

We recognize that the Ordinance does not, in terms, require the City Manager to provide an explanation for the decision not to waive the insurance requirement. *See Forsyth County,* 505 U.S. at 133. However, it does require the City Manager to identify the "specific risks, hazards and dangers to the public health and safety" and to propose that the organizers "redesign or reschedule" the event in response to those risks. LBMC § 5.60.080(D). This communication constitutes a sufficient explanation of the City Manager's decision. We also recognize that the Ordinance allows "any person aggrieved by the issuance, denial,

or revocation of a permit" to appeal the decision to the City Council to obtain a final determination, which may then be appealed in state court. *Id.* § 5.60.080(A); *see id.* § 5.60.040(E). The Ordinance does not prohibit event organizers from using these methods of review to challenge conditions imposed on permits. *See id.* § 5.60.080(A); *see also City of Lakewood,* 486 U.S. at 772 (applying the unbridled discretion requirements to an official's "authority to condition the permit on any additional terms"). For these reasons, the Ordinance does not afford the City Manager unbridled discretion to exempt an applicant from the insurance requirement.

5. Criminal Liability for Violation of the Ordinance

The Peace Network contends that the Ordinance is unconstitutional because it authorizes criminal liability for unknowing violations of its provisions. According to the Peace Network, the Ordinance "imposes strict liability on anyone who participates or engages in, or permits another to conduct a special event." The Peace Network has misread the Ordinance. Section 5.60.120 authorizes a misdemeanor penalty, but does so only for a "person who intentionally violates any of the provisions of" § 5.60. LBMC § 5.60.120. To the degree that the Ordinance is otherwise constitutional, a misdemeanor penalty for intentional violation of its provisions does not violate the First Amendment.

C. Unconstitutional Features of § 5.60

1. "Special" Events

A "special event," as defined by the Ordinance, requires a permit issued by the City Manager. There are three categories of special events under the Ordinance. The Peace Network argues that requiring a permit for the second and third categories is unconstitutional. We disagree with its arguments as to the second category, but agree with its argument as to the third category.

A special event requires a permit if it is conducted "in, on or upon any city street, sidewalk, alley, park, way, pier, public place, public property or public right-of-way which is owned or controlled by the city." *Id.* § 5.60.020(A). The Ordinance defines "special event" as:

> 1. Any organized formation, parade, procession, demonstration or assembly which may include persons, animals, vehicles, or any combination thereof, which is to assemble or travel in unison on any street, sidewalk or other public right-of-way owned or controlled by the city which does not comply with applicable traffic regulations, laws or controls; or
>
> 2. Any organized assemblage of seventy five (75) or more persons at any public place, property or facility which is to gather for a common purpose under the direction or control of a person; or

> 3. Any other organized activity involving seventy five (75) or more persons conducted by a person for a common or collective use, purpose, or benefit which involves the use of, or has an impact on, public property or facilities and which may require the provision of city public services in response thereto.

Id. § 5.60.010(I)(1)-(3). The City recently promulgated a regulation limiting the third category to activities that are "likely to require the provision of city services" for six specified purposes: "street blockage," "erecting barriers," "construction," "traffic control," "crowd control," or "litter abatement (for amounts in excess of that normally expected for the public property or facilities involved)." AR 8-28(IV)(A)(1)-(2).

The Peace Network first argues that because the term "common purpose" in the second category of special event is not defined, "[t]he determination of whether a group is assembled for a 'common purpose' is, necessarily, a content-based judgment." We disagree.

The "common purpose" language in the second category can be "justified without reference to the content of the regulated speech," *Clark*, 468 U.S. at 293, because the provision applies regardless of whether the people are engaged in an expressive activity and because it furthers the City's interest in receiving advance notice when large groups are planning to assemble so that it may regulate competing uses – a justification unrelated to the content of

speech. *See Food Not Bombs,* 450 F.3d at 1042. The language of the category applies when the "organized assemblage" is planning "to gather for a common purpose *under the direction or control of a person.*" LBMC § 5.60.010(I)(2) (emphasis added). Without the common purpose limitation, seventy-five people who happened to be in a park at the same time and who assembled in an organized manner in response to police instructions to move to a different part of the park would require a permit to do so.

The Peace Network next argues that because the second special event category requires a permit for any "organized assemblage" of seventy-five or more people at any public place, without specifying any adverse impact on any substantial governmental interest, it fails the narrow tailoring requirement. *See* LBMC § 5.60.010(I)(1)-(3). We disagree.

The second category encompasses only events that take place "at any public place, property or facility." *Id.* § 5.60.010(I)(2). Such public places include public open spaces, where we have held that the substantial governmental interests are "only to regulate competing uses and provide notice to the municipality of the need for additional public safety and other services." *Food Not Bombs,* 450 F.3d at 1042. We recognized in *Food Not Bombs* that those governmental interests are significant, holding that "[g]roups of 150 or more, whether demonstrating or playing soccer, are by any measure sufficiently large enough to affect or have an impact on the use of [the City's] public spaces by other citizens and therefore to

implicate the City's interest in maintaining the safe and compatible use of limited public open space." *Id.* at 1043 (internal quotation marks omitted). We cautioned, however, that "a substantially lower number may well not comport comfortably with the limited governmental interests at play in public parks and open spaces." *Id.* at 1043 n.17.

The second category of special event applies to groups of seventy-five or more people conducting activities "at any public place, property or facility," exactly half the number we upheld in *Food Not Bombs*. LBMC § 5.60.010(I)(2); *see* 450 F.3d at 1042-43. The Supreme Court has recognized a government's significant interest in managing competing uses when large groups of people intend to use public property. *See Thomas,* 534 U.S. at 322. Although it is a close question, we hold that a group of seventy-five people using a public open space in Long Beach is large enough to warrant an advance notice and permitting requirement. *See Grossman,* 33 F.3d at 1206. Advance notice and permitting requirements applicable to smaller groups would likely be unconstitutional, unless such uses implicated other significant governmental interests, or where the public space in question was so small that even a relatively small number of people could pose a problem of regulating competing uses. Similarly, advance notice and permitting requirements for the use of much larger open spaces than those regulated by the LBMC might be unconstitutional even for groups of seventy-five. Because we hold that the second category is

narrowly tailored in public open spaces, it is necessarily narrowly tailored in other public spaces such as sidewalks and streets, where the governmental interests are stronger. *See Food Not Bombs*, 450 F.3d at 1039 ("[T]he significant governmental interest justifying the unusual step of requiring citizens to inform the government in advance of expressive activity has always been understood to arise only when large groups of people travel together on streets and sidewalks."). *Compare* LBMC § 5.60.010(I)(1) (requiring a permit for groups of any size using sidewalks and streets when the use "does not comply with applicable traffic regulations"), *with id.* § 5.60.010(I)(2) (requiring a permit for groups of seventy-five or more persons "at any public place, property, or facility").

Finally, the Peace Network argues that the third category of special event is not narrowly tailored to serve a substantial governmental interest. We agree.

The distinction between the second category of "special event," defined as "[a]ny organized assemblage of seventy five (75) or more persons at any public place" and the third category of "special event," defined as "[a]ny other organized activity involving seventy five (75) or more persons" in a public place is discernible, but only with some effort. As we construe the Ordinance, an "organized activity" in a public place is not necessarily an "organized assemblage." For example, a group might organize a "5K Fun Run" in which fifty people race. Course monitors, first aid personnel, and spectators might be stationed along

the course. This "organized activity" could easily "involv[e] seventy five (75) or more persons" and would be "conducted . . . for a common or collective . . . purpose." LBMC § 5.60.010(I)(3). Yet if the runners, spectators, course monitors, and first aid personnel never gather together in one place, it is possible that this event might never amount to an "organized assemblage of seventy five (75) or more persons." *Id.* § 5.60.010(I)(2).

It is unclear to us whether the third category is confined to events in public places. If it is not so confined, an advance permitting requirement cannot be justified, as it can be for the second category, on the ground of regulating competing uses in such places. But even if the third category is confined to events in public places, it is still not narrowly tailored.

The critical qualifying criterion for inclusion in the third category is that the event "may require the provision of city public services in response thereto." LBMC § 5.60.010(I)(3). If we look only to the text of the Ordinance, the possibility of requiring the provision of any city public service – no matter how trivial the service – is enough to qualify the event for inclusion in the third category. As indicated above, the City has recently promulgated a regulation in an attempt to narrow the definition of city public services under the third category. The six services listed in the new regulation – any one of which would qualify the event as a special event requiring an advance permit – are "street blockage," "erecting barriers,"

"construction," "traffic control," "crowd control," "litter abatement." We hold that this regulation has not sufficiently narrowed the definition of city public services that may be required by an expressive event to satisfy the narrow tailoring requirement.

In *Food Not Bombs,* we upheld an ordinance that required a permit for any "march, procession, walk, run or assembly on public sidewalks or City park paths" that was "likely to [] interfere with the free use of any public way . . . or not comply with traffic regulations." 450 F.3d at 1038-39 (internal quotation marks omitted; second alteration in *Food Not Bombs;* emphasis removed). That is, we held that the permitting requirement was valid to the extent that the event was likely to interfere with the use of public ways or to violate traffic regulations. We think it is also safe to say that a permitting requirement would be valid to the extent that the event was likely to pose a threat to public safety.

But the third category, described in § 5.60.010(I)(3), even as modified by the recent regulation, includes events that may require nothing more than city public services to deal with litter. The City has offered no argument that litter abatement is a substantial governmental interest. In *Schneider v. New Jersey*, the Supreme Court held that legislation enacted to further the governmental interest in

> keep[ing] the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully

> on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech[.]

308 U.S. 147, 162 (1939). Unlike the government's interest in regulating competing uses of park space, preserving free use of public ways, enforcing traffic rules or ensuring public safety, the government's interest in litter abatement is not sufficient to justify a prior restraint on an expressive activity through a permitting requirement.

Three of the other specified city public services are clearly related to free use of public ways, traffic violations or public safety, and would thus be permissible bases for requiring advance permits: "street blockage," "erecting barriers," and "traffic control." The two remaining city public services are less clearly related to substantial governmental interests – "construction" and "crowd control." These two services *could be* sufficiently related, depending on the type and purpose of the construction and crowd control, but a more precise definition would be needed before we could conclude that they were.

The government has the burden of showing that a restriction is narrowly tailored. *Bay Area Peace Navy,* 914 F.2d at 1227. We conclude that the City has failed to carry its burden to show that the definition of the third category of special event, described in

§ 5.60.010(I)(3) and the accompanying administrative regulation, is narrowly tailored to serve a significant governmental interest.

2. "Spontaneous" Events

"Spontaneous" events are defined as "parades, assemblies or demonstrations involving expressive activity and which are occasioned by news or affairs coming into public knowledge within five (5) days of such parade, assembly or demonstration." LBMC § 5.60.030(A)(5). The Peace Network argues that the provisions governing "spontaneous" events are not narrowly tailored and do not provide sufficient alternative means of communication.[4] We agree.

Spontaneous events are not subject to the permitting requirements applicable to "special" events. *Id.* However, organizers who wish to hold spontaneous events are required to "give written notice to the city manager at least twenty four (24) hours prior to such parade or assembly." *Id.* The twenty-four-hour advance notice requirement for spontaneous events is less demanding than the three-, five- or ten-day notice requirements for "special" events involving expressive activity. LBMC § 5.60.040(D) (requiring three-day advance notice for events held on "sidewalks," "parks," or "waterways and piers," five-day

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[4] The Peace Network does not challenge the notice requirements for non-spontaneous events. *Cf. Food Not Bombs*, 450 F.3d at 1043-45.

notice for "alleys and other rights-of-way other than sidewalks," and ten-day notice for "streets, highways and thoroughfares").

The City Manager may impose "reasonable time, place and manner restrictions" on a spontaneous event. *Id.* § 5.60.030(B). Further, the City Manager may deny permission to hold a spontaneous event based on the same criteria applicable to a special event. *Id.* § 5.60.030(C). Such criteria include, *inter alia,* unreasonable disruption of traffic, unreasonable interference with access to police or fire stations, and undue hardship to adjacent businesses or residents. *Id.* § 5.60.070(A).

Courts have considered several factors in determining the validity of requirements applicable to expressive activity in response to late-breaking news or to issues of immediate or urgent concern. These factors include the ability of individuals to respond quickly to events or issues of concern, the scope of the regulation, and available alternative means of expression. *See Food Not Bombs,* 450 F.3d at 1046-47. We consider these factors in turn.

First, as just noted, the Ordinance requires groups to give the City at least twenty-four-hours advance notice before holding a "spontaneous" event. The Supreme Court has observed that "timing is of the essence in politics. . . . [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth,* 394 U.S. at 163. "[T]he change in timing [imposed by an

advance notice requirement] will alter the potential impact of [the participants'] speech. For speech that is truly time sensitive, the precise spontaneous moment will be lost." *Food Not Bombs,* 450 F.3d at 1046. "By requiring advance notice, the government outlaws spontaneous expression. Immediate speech can no longer respond to immediate issues." *City of Richmond,* 743 F.2d at 1355; *cf. Ariz. Right to Life Political Action Comm. v. Bayless,* 320 F.3d 1002, 1008 (9th Cir. 2003) ("To suggest that the [twenty-four-hour] waiting period is minimal ignores the reality of breakneck political campaigning and the importance of getting the message out in a timely, or, in some cases, even instantaneous fashion."). A twenty-four-hour advance notice requirement for a spontaneous event is not categorically unconstitutional. But it may be so, depending on factors such as the definition of a spontaneous event and the availability of alternative means of expression.

Second, a spontaneous event includes all "[s]pontaneous parades, assemblies, or demonstrations involving expressive activity" occasioned by "news or affairs coming into public knowledge within five (5) days of such parade, assembly or demonstration[.]" LBMC § 5.60.030(A)(5). That is, a spontaneous event would be a "special event" requiring a formal permit were it not for the time-sensitivity of the event. A "demonstration" is separately defined in the Ordinance as "any formation, procession or assembly of persons for the purpose of expressive activity, who intend to or do assemble or travel in unison on any

street, sidewalk or other public right-of-way owned or controlled by the city in a manner that does not comply with normal or usual traffic regulations, laws or controls." *Id.* § 5.60.010(B). However, "parade" and "assembly" are not separately defined. We may reasonably assume, even without a separate definition, that a "parade" is a procession that takes place on a public street or other public right-of-way.

But the definition of an "assembly" that constitutes a spontaneous event is not so obvious. The definition of a "special event" requiring a permit includes "[a]ny organized assemblage of seventy five (75) or more persons in any public place, property or facility which is to gather for a common purpose under the direction or control of a person."[5] Because a spontaneous event is the same thing as a special event but for its time sensitivity, we take the definition of "assembly" to be at least as broad as "organized assemblage." The definition of "assembly" may well be broader, but for present purposes that does not matter, for the definition of organized

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[5] The definition of a special event also includes "[a]ny other organized activity involving seventy five (75) or more persons conducted by a person for a common or collective use, purpose or benefit which involves the use of, or has an impact on, public property or facilities and which may require the provision of city or public services in response thereto." We hold that this definition of special event is unconstitutional because it is not narrowly tailored. *See supra* Part IV.C.1. We do not rely on this definition for purposes of determining the definition of "assembly," as that term is used in defining a spontaneous event.

assemblage includes assemblies that take place on the lawn in front of a city hall, in a public park, on a publicly owned soccer field, or possibly even on a privately owned but publicly accessible open space. Thus, the spontaneous event regulation – and the twenty-four-hour advance notice requirement – apply to assemblies in places where there is no threat of disruption of the flow of pedestrian or vehicular traffic.

Third, alternative means of expression are limited for people who cannot comply, or who could comply only with difficulty, with the twenty-four-hour advance notice requirement. We wrote in *Food Not Bombs,* "[T]o comport with the First Amendment, a permitting ordinance must provide some alternative for expression concerning fast-breaking events." 450 F.3d at 1047. Therefore, we "consider . . . whether the [LBMC] advance notice requirement, including the spontaneous expression exception, overall provides adequate alternatives for expression, both planned and spontaneous." *Id.* at 1046; *see also Ctr. for Fair Pub. Policy v. Maricopa County,* 336 F.3d 1153, 1170 (9th Cir. 2003) ("The Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting." (citation and internal quotation marks omitted)).

We conclude that the regulation of "spontaneous" events under the Ordinance is not narrowly tailored

to regulate only events in which there is a substantial governmental interest in requiring such advance notice. The regulation requires twenty-four-hour advance notice irrespective of whether there is any possibility that the event will interfere with traffic flow. Further, the regulation fails to provide ample alternative means of communication for people wishing to participate in spontaneous expressive events.

The regulation of spontaneous events under the Ordinance stands in stark contrast to the Santa Monica spontaneous event regulation that we recently upheld in *Food Not Bombs*. There, "with respect to time-sensitive speech," large groups had three alternatives to providing notice before such an event. First, the City Hall lawn was open to any group wishing to engage in speech. *Food Not Bombs*, 450 F.3d at 1048. Second, a "safe harbor provision" described formations for sidewalk marches that would not require a permit and that would be available for "groups as large as 1,999." *Id.* Third, the ordinance explicitly exempted "unorganized" gatherings from the provisions. *Id.* at 1049; *see City of Richmond*, 743 F.2d. at 1355-56 ("[T]he delay inherent in advance notice requirements inhibits speech. By requiring advance notice, the government outlaws spontaneous expression. Immediate speech can no longer respond to immediate issues. The quantity of effective speech is limited.").

3. Hold-harmless and Indemnification Clauses

The Ordinance contains a broadly worded clause under which a permittee is required to agree to hold harmless and indemnify the City for harm arising out of the permitted activity. LBMC § 5.60.080(A). The permit application form contains an even more broadly worded clause. These requirements apply to "[e]ach permit" and differ from the indemnification alternative to insurance set forth in § 5.60.080(D). The Peace Network argues that these clauses are unconstitutional because they are not narrowly tailored to serve a significant governmental interest. We agree.

The hold-harmless and indemnity clause of the Ordinance provides, in relevant part:

> Each permit shall expressly provide that the permittee agrees to defend, protect, indemnify and hold the city, its officers, employees and agents free and harmless from and against any and all claims, damages, expenses, loss or liability of any kind or nature whatsoever arising out of, or resulting from, the alleged acts or omissions of permittee, its officers, agents or employees in connection with the permitted event or activity[.]

LBMC § 5.60.080(A). The permit application form requires not only that permittees agree to hold harmless and indemnify the City for expenses resulting from "acts or omissions" of the "permittee, its officers,

agents or employees." It also requires that permittees agree that their "organization will hold the City harmless from *any liability caused by the conduct of the event.*" (Emphasis added.) It states that "[t]he City will not be liable for any mishaps or injuries associated with the event," and goes on to provide that "[f]ull responsibility for activities at the event will be assumed by the organization."

We evaluate not only the text of the Ordinance, but also the manner in which it has been implemented by governing authority. *See Ward,* 491 U.S. at 795-96 (including the administrative implementation of a challenged provision in the Court's constitutional analysis); *cf. Forsyth County,* 505 U.S. at 131 n.9 (examining the language of a permit application form to determine how the local government interpreted an ordinance provision). The terms "hold-harmless clause" and "indemnity clause" often refer to the same thing – an agreement under which "one party agrees to answer for any . . . *liability* or *harm* that the other party might incur." *Black's Law Dictionary* 784 (8th ed. 2004) (defining "indemnity clause," noting that the clause is "[a]lso termed *hold-harmless clause; save-harmless clause*" (emphasis in original)).

Another provision of the Ordinance provides that "departmental services charges" may be assessed against a permittee, except that such charges may not include a charge for police protection of the permittees. LBMC § 5.60.010(C); *see Forsyth,* 505 U.S. at 133-36; *Food Not Bombs,* 450 F.3d at 1049. The Peace Network has not challenged the assessment of

departmental services charges except (as we discuss in the next section) to the extent that the City Manager has unbridled discretion to decide whether such charges will be assessed in a particular case. For purposes of our analysis of the hold harmless and indemnity clauses, we assume that the assessment of departmental services charges, as those charges are defined in the Ordinance, is permissible. The question before us, therefore, is whether the City may require the permittees to hold harmless and indemnify the City for the remaining costs specified in the clauses.

The clauses, taken together, require permittees (1) to agree to compensate the City for any "damages, expenses, loss or liability . . . arising out of or resulting from the alleged actions or omissions" of permittees; (2) to agree to hold the City harmless for "any liability caused by the conduct of the event" to permittees; and (3) to agree to reimburse the City for "any liability caused by the conduct of the event" to third parties. The phrase "any liability caused by the conduct of the event" is susceptible to a broad reading, encompassing liability caused by the acts or omissions of any person or entity involved in the event, including acts and omissions not only of the permittees but also of the City and third parties.

We conclude that the clauses are not narrowly tailored to serve a substantial governmental interest. In performing our narrow tailoring analysis, we ask whether the clauses serve a substantial governmental interest without restricting substantially more speech

than necessary, and whether there are obvious alternatives that would achieve the same objectives while restricting less speech. We hold that the clauses are not narrowly tailored in three respects.

First, the clauses require that the permittees compensate the City for any "damages, expenses, loss or liability . . . arising out of . . . the alleged acts or omissions of permittee." LBMC § 5.60.080(A). The permit application further requires permittees to indemnify the City for any "mishaps or injuries," intentional or otherwise, that are "associated with the event." It is well established that governments may not "recoup costs that are related to listeners' reaction" to speech. *Forsyth County*, 505 U.S. at 135 n.12. The Supreme Court explained in *Forsyth County* that recouping such costs is unconstitutional because "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Id.* at 134-35. The Ordinance specifically provides that the cost of providing police protection is excluded from "departmental services charges," *see* LBMC § 5.60.010(C), but the clauses would require permittees to compensate the City for more than just "departmental services charges." The indemnification and hold-harmless clauses contain no exclusion for losses to the City occasioned by the reaction to the permittees' expressive activity. The clauses thus allow the City impermissibly to shift some of the costs related to listeners' reactions to speech from the City to the permittees.

Second, the clause contained in the permit application requires that permittees hold the City harmless for "any liability caused by the conduct of the event" – including, under a broad reading of this language, liability of the City to the permittees. That is, the clause requires that the permittees agree, as a condition of obtaining a permit to engage in expressive speech, to forgo recovery on any cause of action they might otherwise have against the City. The clause encompasses not only liability for physical harm to the permittees, but also for deprivation of permittees' constitutional rights. *Compare generally Orin v. Barclay,* 272 F.3d 1207, 1216 (9th Cir. 2001) (holding in a § 1983 action that state officials were not entitled to qualified immunity for limiting the message of a speaker who was protected by First Amendment). We think it obvious that permittees cannot be required to waive their right to hold the City liable for its otherwise actionable conduct as a condition of exercising their right to free speech.

Third, the clause in the permit application requires that permittees hold the City harmless for "any liability caused by the conduct of the event" to third parties. The permit application requires permittees to take "[f]ull responsibility for activities at the event." The provision requires permittees to assume legal and financial responsibility even for those "activities at the event" that are outside the control of the permittee, indeed including activities of the City. In *NAACP v. Claiborne Hardware Co.,* the Supreme Court reviewed the damages awards from a

civil rights boycott in Mississippi and explained that liability for costs arising out of protected expressive activity is limited by the amount of control the speaker exerts over the actors and the message of the speech. 458 U.S. at 916-20. The Court held that "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages," *id.* at 916-17, and declined to impose liability "merely because an individual belonged to a group, some members of which committed acts of violence." *Id.* at 920. The Court wrote that "[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims" because "'[i]n this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."'" *Id.* (quoting *Carroll v. Princess Anne,* 393 U.S. 175, 183-84 (1968)). Requiring permittees to compensate third parties for harm caused by hecklers, counter-protesters, or other persons not part of permittees' organization restricts substantially more speech than the liability found unconstitutional in *Claiborne Hardware. See* 458 U.S. at 916-17, 918-19. Similarly, requiring permittees to compensate third parties for harm caused by acts and omissions of the City impermissibly restricts speech.

The City argues that the clauses should be upheld because we did not strike down similar provisions in *Food Not Bombs*. For two reasons, we disagree. First, the clauses in this case are broader than the provisions upheld in *Food Not Bombs*. *See* 450 F.3d at 1056 (Kleinfeld, J., writing for the majority). In that case, Santa Monica had imposed a hold-harmless provision that was limited to "all claims, damages, expenses, [and] loss or liability" resulting from "alleged willful or negligent acts or omissions of permittee, its officers, agents, or employees in connection with the permitted event or activity." *Id.* at 1056 n.10 (internal quotation marks omitted).

Second, although we did not address the issue of narrow tailoring in *Food Not Bombs* because plaintiffs had challenged the provision only on the ground that it was content-based, *id.* at 1058 (Wardlaw, J., concurring), our conclusion in this case is supported by the comments of two of the judges on the *Food Not Bombs* panel. 450 F.3d at 1052 (Berzon, J., dissenting in part); *id.* at 1058 (Wardlaw, J., concurring). Judge Berzon wrote that the indemnification provision in that case was "not narrowly tailored to the governmental interest in protecting the City from bearing costs arising from injuries or other liabilities due to the permittees' wrongful conduct of the event or conditions at the site." *Id.* at 1052 (Berzon, J., dissenting in part). Judge Wardlaw acknowledged that the contention that the provision was not narrowly tailored "might have been the better

argument," but in her view, the argument had been waived because the plaintiff had failed to raise it. *Id.* at 1058 (Wardlaw, J., concurring).

4. Funding and Waiver of Permit Fee and Departmental Services Charges

The Ordinance authorizes the imposition of a fee for a permit to hold a "special event," as well as the imposition of "departmental services charges" for costs incurred by the City as a result of either "special" or "spontaneous" events. The Ordinance allows the City, in its discretion, to fund or waive the permit fee and the departmental services charges. The Peace Network argues that the funding and waiver provision allows the exercise of unbridled discretion and is therefore unconstitutional. We agree.

The Ordinance provides that "a permit fee" "shall be established by the city council by resolution," but that the fee may be "funded or waived by council resolution or ordinance." LBMC § 5.60.050(A). The Ordinance further provides that "departmental services charges" shall be assessed against a "permittee." *Id.* §§ 5.60.090(a), 5.60.010(C). In this context, the term "permittee" appears to include both someone who has been granted a permit to hold a "special event," as well as someone who is exempt from the formal permit process but has been given permission to hold a "spontaneous" event. The Ordinance provides that departmental services charges may be

"funded, partially funded or waived by action of the city council." *Id.* § 5.60.090(A). The Ordinance does not specify criteria for determining whether those fees and charges will be funded or waived by the City Council.

We note at the outset that the unbridled discretion argument is somewhat unusual in this case. Here, the discretion to fund or waive the fees and charges rests in the hands of the City Council – the elected, legislative body of the City. Unbridled discretion challenges typically arise when discretion is delegated to an administrator, police officer, or other executive official. *See, e.g., Thomas,* 534 U.S. at 318 (Chicago Park District); *Forsyth County,* 505 U.S. at 132 (county administrator); *Cox,* 312 U.S. at 576 (licensing board); *Menotti,* 409 F.3d at 1144 (police officers); *S. Or. Barter Fair,* 372 F.3d at 1137 (Department of Human Services); *Linick,* 195 F.3d at 542 (Forest Service). *But see City of Richmond,* 743 F.2d at 1357 (City Council). Delegation in the administrative law context refers to delegation of legislative authority to the executive branch. *See, e.g., United States v. Mead Corp.,* 533 U.S. 218, 226-27 (2001). In the First Amendment context, some of the delegation of authority concerns are the same, such as lack of accountability and inability to obtain effective judicial review. *See Freedman v. Maryland,* 380 U.S. 56, 57 (1965). Two other concerns, largely unrelated to delegation, are relevant to our First Amendment analysis: the need for narrow tailoring, *Gaudiya Vaishnava Soc'y,* 952 F.2d at 1065, and the desire to eliminate

the opportunity for officials to engage in content-based discrimination through the exercise of discretion, *Forsyth County,* 505 U.S. at 133. Those concerns are relevant to a First Amendment analysis even if the discretion remains with a legislative body and has not been delegated to an administrative official.

The permitting scheme of the Ordinance requires organizers to come to the City for permission to hold an expressive event. If a legislative body retains discretion to make an important decision as part of that permitting scheme – here, whether to fund an event or to waive fees and charges – that discretion is distinct from the general discretion a legislative body has to enact (or not enact) laws. Absent a preexisting permitting scheme, a city council could not in advance impose service charges or other fees on a group seeking to hold a demonstration in a public forum. *Cf. Simon & Schuster, Inc.,* 502 U.S. at 115-16; *Rust v. Sullivan,* 500 U.S. 173, 194-95, 199-200 (1991). The Long Beach City Council's reserved authority to waive or fund charges is thus unlike its usual legislative authority. We conclude that in the First Amendment context, where a legislative body has enacted a permitting scheme for expressive conduct but has reserved some decisionmaking authority for itself under that scheme, that reserved authority is vulnerable to challenge on grounds of unbridled discretion.

Our conclusion is supported by *Shuttlesworth v. City of Birmingham,* in which the Supreme Court evaluated an ordinance requiring participants in

parades and other public demonstrations to obtain a permit from the "City Commission," 394 U.S. at 148, which was "the governing body of the City of Birmingham," *Shuttlesworth v. City of Birmingham,* 281 Ala. 542, 544 (1967). The Court concluded that because the city's "ordinance . . . conferred upon the City Commission virtually unbridled and absolute power to prohibit" parades and demonstrations, *Shuttlesworth,* 394 U.S. at 150, it was facially unconstitutional. *See id.* at 151. The Tenth Circuit reached a similar conclusion in *Association of Community Organizations for Reform Now (ACORN) v. Municipality of Golden,* 744 F.2d 739, 747 (10th Cir. 1984). The court held that the exercise of unbridled discretion by a city council in a permitting scheme was unconstitutional. It wrote:

> We fail to see how it matters for First Amendment purposes whether unguided discretion is vested in the police or the city council. Vesting either authority with this discretion permits the government to control the viewpoints that will be expressed. Whether the city council or the police exercise this power, we believe that it runs afoul of the basic principle that "forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others."

Id. at 747 (quoting *Taxpayers for Vincent,* 466 U.S. at 804). We disagree with the apparently contrary conclusion of the California Court of Appeal in *Long Beach Lesbian & Gay Pride, Inc. v. City of Long*

Beach, 14 Cal. App. 4th 312, 344 (1993) ("It is not a delegation of power to an official but a recognition of the innate authority of the City's legislative body. The city council has the power to grant special permits, and to amend Chapter 5.60; the mere existence of that potential does not present a case of unguided discretion.").

The City has pointed to no provision of the Ordinance, or to any implementing regulation, that guides the City Council's decision whether to fund or waive fees and charges. The lack of specific articulated bases for making this decision compels the conclusion that the City Council has unconstitutional unbridled discretion. *See City of Richmond,* 743 F.2d at 1357 ("The dangers of discretion are particularly evident in parade permit schemes, where waivers will often be sought for politically controversial causes. It is precisely when political and social pressures are most likely to affect decisionmaking that objective standards to govern discretion are most essential." (internal quotation marks omitted)). The City argues, based on *Thomas,* that because the waiver provision is permissive it cannot be an unconstitutional infringement on speech. In *Thomas,* the Supreme Court held that the "permissive nature" of a provision that allowed city officials to grant a permit for an expressive event despite an application's "fail[ure] to meet . . . technical requirements," so long as a waiver did not harm the "policies furthered by the application requirements," was not unconstitutional. 534 U.S. at 325. The Court wrote that the provision

"furthers, rather than constricts, free speech." *Id.* The Court added, "Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements." *Id.* The challenged provision in *Thomas* is strikingly dissimilar to the provision in our case. In *Thomas,* the provision operated only in the narrow circumstance where the permit application was technically deficient. The provision then provided a generous criterion for forgiving the technical defect and allowing the event to go forward despite the defect. By contrast, this Ordinance authorizes the City Council to decide whether to fund or waive fees and charges for all permissive events subject to the Ordinance, not limited to events for which a permit application was technically deficient, and authorizes the City Council to make that decision with no governing criteria whatsoever.

The City argues that the City Council has not, in fact, used its authority to fund or waive fees and charges based on the content of the expressive activity. Even if this were so, it would be irrelevant. The question is not whether a city has unlawfully favored certain messages or certain kinds of speech. The question is whether the ordinance in question allows the City to do so. A presumption that a city official "will act in good faith and adhere to standards absent from the ordinance's face . . . is the very

presumption that the doctrine forbidding unbridled discretion disallows." *City of Lakewood,* 486 U.S. at 770.

Although we need not do so for the disposition of this case, we note that, contrary to the City's argument, the record contains evidence of content-based favoritism. The Peace Network held two similar events, separated by less than two months, both with at least 1,000 attendees. For the February event, held before the United States initiated hostilities in Iraq, and attended by government officials, the City assessed no fee or charges. For the March event, held after the commencement of hostilities in Iraq and *not* attended by government officials – the City assessed charges of $7,041. This favoritism is a manifestation of the very dangers inherent in unbridled discretion.

The Peace Network does not argue that, in the absence of unbridled discretion, the provisions allowing the assessment of fees and charges are unconstitutional. We therefore do not address the issue whether, absent the authority to exercise unbridled discretion to fund or waive the fees and charges, the provisions allowing their assessment are narrowly tailored and allow ample alternatives for speech.

VI. Severability

The district court found that Section 5.60 was a content-based restriction on free speech and issued a permanent injunction against enforcement of the

Ordinance in its entirety. We conclude that some features are constitutional and that others are unconstitutional. The parties did not brief the issue of severability before the district court or this court. Severability of a local ordinance is a question of state law. *City of Lakewood,* 486 U.S. at 772; *Tucson Woman's Clinic v. Eden,* 379 F.3d 531, 556-57 (9th Cir. 2004) (as amended). We remand so that the district court may conduct the severability analysis in the first instance after briefing from the parties.

VII. Conclusion

For the foregoing reasons, we hold that some features of LBMC § 5.60 are constitutional and that others are unconstitutional. We remand to the district court for further proceedings consistent with this opinion.

AFFIRMED in part; REVERSED in part; REMANDED.

BERZON, Circuit Judge, concurring:

I concur fully in Judge Fletcher's opinion.

I continue to believe that an insurance requirement of the kind imposed by Long Beach is potentially content-based, and therefore invalid. The Long Beach ordinance does not limit the requirement to insurance policies priced solely on the size and location of the special event. *See Thomas v. Chicago*

Park Dist., 227 F.3d 921, 925 (7th Cir. 2000) (upholding an insurance requirement where "[t]he required amount and the cost of the insurance depend only on the size of the event and the nature of the facilities involved in it (a bandstand, stage, tents, and so forth)"), *aff'd on other grounds*, 534 U.S. 316 (2002). Instead, the ordinance requires the purchase of insurance even if, as could well be the case, the insurance premium reflects the insurer's assessment of the connection between the risk of loss and the content of the insured's expressive activity. For that reason, were I free to do so, I would follow the substantial case law holding such an insurance requirement unconstitutional as a violation of the First Amendment. *See Santa Monica Food Not Bombs v. City of Santa Monica* ("*Food Not Bombs*"), 450 F.3d 1022, 1049-52 (9th Cir. 2006) (Berzon, J., dissenting in part); *id.* (citing cases invalidating insurance requirements for public forum permits as content-based).

I fully expressed this view, however, in *Food Not Bombs*, but did not prevail. The *Food Not Bombs* majority did not acknowledge the substantial case law supporting my conclusion, and did not consider the likelihood that insurance premiums would, like the fees set in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992), reflect the content of the permittee's expression and the likely reaction of bystanders to that content. Still, I am bound by *Food Not Bombs* as precedent, and so concur.

I note that the discussion in this opinion of the indemnification provision supports my view that setting an unrestricted insurance requirement as a condition for issuing a permit for expressive activity is unconstitutional. We explain today why the indemnity provision is not narrowly tailored. Insurance companies typically set premiums by first determining the risk of loss. Nothing in the Long Beach ordinance would prevent any issuer from taking into account, in assessing the risk of loss and then setting the premium for event insurance accordingly, the very considerations we conclude make the indemnity provision insufficiently narrowly tailored. Moreover, an insurance requirement demands up front payment even if the insured risk never eventuates, making it even *less* narrowly tailored, and *more* likely to discourage communicative activities in public fora than an indemnity requirement.

I nonetheless concur, as I agree with Judges Fletcher and Pregerson that there is no difference of principle between the insurance requirement in this case and the one in *Food Not Bombs*.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LONG BEACH AREA PEACE NETWORK; DIANA MANN, *Plaintiffs-Appellees*, v. CITY OF LONG BEACH, a municipal corporation, *Defendant-Appellant.*	No. 05-55083 D.C. No. CV-04-08510-SJO OPINION

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted
February 16, 2007 – Pasadena, California

Filed April 15, 2008

Before: Harry Pregerson, William A. Fletcher, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge William A. Fletcher;
Concurrence by Judge Berzon

COUNSEL

Randall C. Fudge, Long Beach City Attorney's Office, Long Beach, California, for the appellant.

Carol A. Sobel, Santa Monica, California, for the appellees.

OPINION

W. FLETCHER, Circuit Judge:

We review the constitutionality of § 5.60 of the City of Long Beach Municipal Code ("LBMC" or "Ordinance"). Appellees Long Beach Area Peace Network and Diana Mann (collectively "the Peace Network") challenged § 5.60 under the First Amendment after the City of Long Beach ("the City") sought payment of administrative fees associated with a march and rally held by the Peace Network on March 22, 2003. The district court held that § 5.60 in its entirety unconstitutionally restricts the right to free speech and permanently enjoined the City from enforcing it. We affirm in part and reverse in part.

We hold that five challenged features of § 5.60 are constitutional: (1) the provisions distinguishing between expressive activity and other activity; (2) the provision allowing the City Manager to impose conditions to meet stated purposes; (3) the provision authorizing the City Manager to obtain proof of indigent status; (4) the provision authorizing the City Manager to require a permittee to obtain insurance; and (5) the provision authorizing criminal penalties for violations of the Ordinance. However, we hold that four other features are unconstitutional: (1) part of the provision defining "special events"; (2) the provision applicable to "spontaneous" events; (3) the hold-harmless and indemnification provision; and (4) the provisions authorizing waiver of permit fees and departmental services charges.

We remand to allow the district court to determine whether the unconstitutional provisions are severable from the remainder of § 5.60.

I. Background

As described by the district court, the Long Beach Area Peace Network is "an unincorporated, loosely organized group of peace activists without an office, organizational phone, organizational email or insurance." On February 15, 2003, before the beginning of the Iraq War, the Peace Network sponsored a protest march and rally in the City of Long Beach, California. In preparation for the event, Dr. Eugene Ruyle ("Ruyle"), a retired professor and Peace Network member, submitted an application for a "special event" permit, as required by § 5.60.020(A). Long Beach Municipal Code ("LBMC") § 5.60.020(A) (1999). After negotiating the march route with Ruyle, the City approved the permit.

The march was conducted on public streets along the route suggested by the City. The event concluded with a rally in Bixby Park, a public park in the City. Several elected officials, including a City Council member and a State Assembly member, participated in the rally. According to some estimates, between 1,000 and 1,500 people attended the event.

The permit application, signed by Ruyle in February 2003, provided that the Peace Network would "hold the City harmless from any liability caused by the conduct of the event"; that the "City

will not be liable for any mishaps or injuries associated with the event"; and that "[f]ull responsibility for activities at the event will be assumed by [the Peace Network]." The application also provided that the Peace Network would "be responsible for all costs incurred by City departments for use of City personnel and/or equipment." After submitting the application, Ruyle wrote a letter to the City requesting a waiver of the permit application fee and the departmental services charges imposed under § 5.60. The City did not assess any fee or charges for the February event.

On March 20, 2003, approximately one month later, the United States launched an aerial assault on Baghdad. In anticipation of the assault, the Peace Network had already organized another march and rally, to be held on March 22. Ruyle had submitted a letter to the City on or about March 18 describing the anticipated "spontaneous" event. Section 5.60 defines a "spontaneous" event as one "occasioned by news or affairs coming into public knowledge within five (5) days" of the event. *See* LBMC § 5.60.030(A)(5). A "spontaneous" event does not require a formal permit, but it does require twenty-four hours advance notice to the City. The City Manager may refuse permission to hold such an event, and may impose "reasonable time, place and manner restrictions." *See* LBMC § 5.60.030(B). An initial email from Ruyle to the City, sent two weeks earlier, had indicated that the Peace Network planned to ask for the closure of at least one lane of traffic for the march and to reserve a

bandshell in Bixby Park for the rally. In his email, Ruyle estimated that the March event would be "at least twice as big" as the February march and rally.

In a letter addressed to Ruyle dated March 21, the City granted permission to conduct a march and rally on March 22. In the letter, the City imposed a number of conditions, including the route of the march and the location of the rally. The letter contained a summary of estimated departmental services charges for "Police," "Public Works," "Park, Recreation & Marine (Park Staff)," "Parks, Recreation & Marine Maintenance," "Space Permit Fee," and "Junipero Parking Lot." The total estimated charges were $7,041. The letter set forth a schedule of payments in four equal installments during the next year. Ruyle and other members of the Peace Network signed the last page of the letter under a heading reading "Conditions Accepted." As signed, this page contained a handwritten notation at the top, stating that the "signers reserve[d] the right to challenge the total," but that they would pay the first of the four installments on March 22. Ruyle paid the first installment on March 22, in accordance with the handwritten notation.

The march on March 22 took slightly more than one hour, and the event concluded with an anti-war rally at Bixby Park. The district court found that approximately 1,000 people participated in the March event. According to Ruyle's declaration, in contrast to the pre-war rally at the park in February, no elected officials participated in the March anti-war rally.

As part of the March event, members of the Surfrider Foundation placed surfboards on the beach in the shape of a peace symbol. The display was visible to participants of the march as they walked near the beach. The display took place entirely on the beach, did not interfere with any vehicular or pedestrian traffic, and did not result in any damage to the beach. Following the event, the surfboards were removed from the beach.

In his initial email, Ruyle had stated that Peace Network planned to request a waiver of insurance and departmental services charges. In its March 21 letter granting the permit, the City waived the insurance requirement but did not waive event-related charges. As he had done after the February march and rally, Ruyle wrote a letter to the City after the March event asking for a waiver of charges. Ruyle states in his declaration that a city official gave "no other guidelines than simply to write the letter" to ask for a waiver. The only material differences between Ruyle's requests for waivers of charges for the February and March events were descriptions of event-specific matters such as the march routes.

The City did not waive the departmental services charges for the March event. In April 2003, the City sent a letter to the Peace Network members whose signatures (or, in the case of Diana Mann, whose name had been signed by someone else) appeared at the bottom of the March 21 letter. The letter requested payment of $7,041, in the installments specified in the March letter. The total amount was

exactly the same as the estimate contained in that letter. Part of the total included a charge of $1,500 for the use of the beach for the surfboard display. The City's April letter noted that the first check, which Ruyle had given to the City on March 22, had been misplaced. The letter asked that payment on that check be stopped and that a new check be written for that amount. Peace Network members did not write a new check or make any of the requested payments.

The City filed an action in state Superior Court against Diana Mann and the Peace Network members who had signed the agreement. The court granted judgment of $5,901 for the City. That amount excluded the $1,500 charge for the use of the beach for the surfboard display because, according to the Superior Court, that charge was "not sufficiently justified as to actual costs" and was "an improper restraint of expression."

The Peace Network then filed a "facial challenge" to § 5.60 in federal district court, seeking declaratory and injunctive relief, compensatory damages, and attorney's fees and costs. The complaint alleged that the City's "past, present and threatened future actions" violate the First Amendment. The district court concluded that the entirety of § 5.60 constitutes an unconstitutional restraint on speech and assembly and entered a permanent injunction prohibiting its enforcement. The City timely appealed.

After the district court's decision and after initial briefing was completed on appeal, we decided *Santa*

Monica Food Not Bombs v. City of Santa Monica ("*Food Not Bombs*"), 450 F.3d 1022 (9th Cir. 2006), assessing the constitutionality of a similar ordinance in Santa Monica, California. We asked the parties to file supplemental briefs addressing our decision in *Food Not Bombs*.

II. Standard of Review

We review de novo the district court's holding of unconstitutionality. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 648 (9th Cir. 2006). We also review de novo the district court's determinations on mixed questions of law and fact that implicate the question of constitutionality. *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007). We generally review for clear error the district court's findings of fact. *Gaudiya Vaishnava Soc'y v. City & County of San Francisco*, 952 F.2d 1059, 1062 (9th Cir. 1991) (as amended). However, we conduct an independent review of the facts for the "issues arising under the First Amendment." *Rosenbaum*, 484 F.3d at 1152.

III. Nature of the Challenge

The Peace Network's complaint asserts a facial challenge to § 5.60. As an initial matter, we conclude that the Peace Network has Article III standing to bring this challenge. Standing, in the constitutional sense, requires that plaintiffs establish (1) a "distinct and palpable" injury in fact (2) that is "fairly traceable"

to the challenged provision and (3) that would "likely . . . be redressed" by a favorable decision for the plaintiff. *Allen v. Wright,* 468 U.S. 737, 750-51 (1984) (internal quotation marks omitted); *see Food Not Bombs,* 450 F.3d at 1033. Plaintiffs mounting a facial challenge to an ordinance may establish standing by alleging that they have "modified [their] behavior" as a result of the ordinance, such as "by choosing locations other than [the areas subject to the ordinance]." *Id.* at 1034. A plaintiff "need not apply for a benefit conditioned by a facially unconstitutional law," *United States v. Baugh,* 187 F.3d 1037, 1041 (9th Cir. 1999), but must demonstrate a "serious[ ] interest[ ] in subjecting [it]self to" the challenged measure, and must demonstrate that "the defendant [is] seriously intent on enforcing[ ] the challenged measure," *NAACP v. City of Richmond,* 743 F.2d 1346, 1351 (9th Cir. 1984).

The Peace Network organized two separate events covered by § 5.60. The City assessed departmental services charges against the Peace Network for the second event and brought suit in state court to obtain payment. The Peace Network has provided evidence that it has modified its behavior as a result of § 5.60 by declining to hold such events in Long Beach in the future because of the City's enforcement of the Ordinance. *See Food Not Bombs,* 450 F.3d at 1034. The Peace Network states that if the permanent injunction against the enforcement of § 5.60 is upheld, it will hold expressive events in Long Beach. The Peace Network has thus established

injury in fact that is fairly traceable to § 5.60 and that is likely to be redressed if its First Amendment suit is successful.

The Peace Network claims that several provisions of the LBMC "allegedly vest[ ] unbridled discretion in a government official over whether to permit or deny expressive activity." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56 (1998). There are two primary rationales for allowing this type of facial challenge.

> First, the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. . . . Second, the absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power.

Id. at 757-58; *see also S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1134-35 (9th Cir. 2004). Hence, "[f]acial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992). The Court wrote in *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940) (citations omitted):

> [T]he rule is not based upon any assumption that application for the license would be refused or would result in the imposition of

> other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor . . . is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is . . . the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. . . . Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.

To assert this type of facial challenge, a plaintiff must meet two requirements. First, a plaintiff must satisfy the standing requirements of Article III by showing that the challenged provision or provisions apply to its conduct. *Members of City Council of L.A. v. Taxpayers for Vincent,* 466 U.S. 789, 798 (1984) ("Such holdings invalidated entire statutes, but did not create any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court."). As noted above, the Peace Network has Article III standing.

Second, the challenged ordinance "must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and

substantial threat of the identified censorship risks." *City of Lakewood,* 486 U.S. at 759. We conclude that § 5.60 has a sufficient nexus to expression to satisfy the second requirement. Section 5.60 governs use of the traditional public fora of public streets, sidewalks, and parks. Indeed, some of the provisions specifically apply to persons engaged in "expressive activity." *See, e.g.,* LBMC § 5.60.040(B) ("[Special event permit] applications for expressive activities [involving the use of city streets, sidewalks, or parks] shall be filed in accordance with subsection D of this section]."). The Peace Network has engaged in, and seeks to engage in, public marches and rallies on the streets, sidewalks, and parks of Long Beach. "[M]ass gatherings [to show support for a cause] bear a sufficient nexus to conduct commonly associated with expression." *S. Or. Barter Fair,* 372 F.3d at 1136. Section 5.60 regulates those mass gatherings and therefore has a "close connection to expression" because it "regulates conduct which is itself protected speech." *See Gaudiya Vaishnava Soc'y,* 952 F.2d at 1062-63.

We therefore conclude that the Peace Network has satisfied the additional requirements to raise a facial challenge on unbridled discretion grounds.

IV. General Considerations

The First Amendment prohibits Congress from enacting laws "abridging the freedom of speech, . . . or the right of the people peaceably to assemble." U.S. Const. amend. I. The Supreme Court has extended

the protection of the First Amendment to the states. *Edwards v. South Carolina,* 372 U.S. 229, 235 (1963); *Thornhill,* 310 U.S. at 95; *Hague v. C.I.O.,* 307 U.S. 496, 512 (1939). Three types of speech regulation are presumptively invalid: regulations on speech protesting government action, regulations affecting speech in a traditional public forum, and prior restraints. By meeting certain criteria, content-neutral time, place and manner restrictions may overcome the presumption of invalidity.

A. Presumptively Invalid Regulations

1. Regulation of Speech Protesting Government Action

We have recognized that certain types of speech enjoy special status. *See, e.g., Nat'l Adver. Co. v. City of Orange,* 861 F.2d 246, 248 (9th Cir. 1988) ("The first amendment affords greater protection to noncommercial than to commercial expression."). Political speech is core First Amendment speech, critical to the functioning of our democratic system. The Peace Network's protest of the United States military action in Iraq is the type of speech that "rest[s] on the highest rung of the hierarchy of First Amendment values." *See Carey v. Brown,* 447 U.S. 455, 467 (1980); *see also Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *Thornhill,* 310 U.S. at 95 ("Those who won our independence had confidence in the power of free and fearless reasoning and communication of

ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion.").

The Supreme Court has recognized that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981)); *see also Edwards*, 372 U.S. at 235 (stating that peaceable assembly at the site of the state government to protest government action is the "most pristine and classic form" of exercising First Amendment rights). In *United States v. Baugh*, we wrote that the First Amendment "applie[d] with particular force" to a "march and other protest activities." 187 F.3d at 1042; *see also Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611 (6th Cir. 2005) ("[P]arades and processions are a unique and cherished form of political expression, serving as a symbol of our democratic tradition. There is scarcely a more powerful form of expression than the political march."). We have also noted the importance of timely opportunity to express political views by staging a political march. *City of Richmond*, 743 F.2d at 1356 ("[T]iming is of the essence in politics. . . . [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all. A delay of even a day or two may be intolerable when applied

to political speech in which the element of timeliness may be important." (internal quotation marks and citation omitted; alterations in *City of Richmond*)).

2. Regulation of Speech in Traditional Public Fora

The Supreme Court has established different levels of scrutiny for analyzing alleged First Amendment violations, depending on where the speech takes place. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983). In traditional public fora, "the government's ability to permissibly restrict expressive conduct is very limited." *United States v. Grace,* 461 U.S. 171, 177 (1983). In such locations, First Amendment protections are strongest and regulation is most suspect. *Grossman v. City of Portland,* 33 F.3d 1200, 1204 (9th Cir. 1994). "Public fora have achieved a special status in our law; the government must bear an extraordinarily heavy burden to regulate speech in such locales." *City of Richmond,* 743 F.2d at 1355.

"Public open spaces" such as parks are distinguished from streets because their use for expressive activities rarely implicates other important governmental interests. *Food Not Bombs,* 450 F.3d at 1042. Public parks and sidewalks "are uniquely suitable for public gatherings and the expression of political or social opinion." *ACORN v. City of Phoenix,* 798 F.2d 1260, 1267 n.5 (9th Cir. 1986). Courts have recognized a somewhat greater governmental interest in

regulating expressive activity on city streets because of the public safety concerns raised by vehicular traffic. *Id.* at 1267. Nonetheless, we have rejected the proposition that "the Supreme Court's designation of streets as public fora" is limited to "sidewalks and other locales traditionally reserved for public communication." *Id.* at 1266. The Supreme Court has recognized that "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz,* 487 U.S. 474, 481 (1988).

Traditional public fora gain even more importance when they are host to core First Amendment speech. *See, e.g., Hague,* 307 U.S. at 515-16. In *Grossman v. City of Portland,* we explained that the "venerable tradition of the park as a public forum has – as suggested by the attendant image of the speaker on a soapbox – a very practical side to it as well: parks provide a free forum for those who cannot afford newspaper advertisements, television infomercials, or billboards." 33 F.3d at 1205. Government restrictions on the use of public places such as streets, sidewalks, and parks risk placing speech on topics of public importance within the purview of only the wealthy or those who enjoy the support of local authorities. *See id.* at 1205 n.8; *City of Richmond,* 743 F.2d at 1356 (calling for careful examination of restrictions "when their effects fall unevenly on different . . . groups in society").

Section 5.60 requires a permit for "special events" on all public property within the City of Long Beach, including streets, sidewalks, and public parks. *See* LBMC § 5.60.020(A). "Special events" include parades, demonstrations, and assemblies of any size on public streets and sidewalks if they do not comply with applicable traffic regulations; organized assemblages of seventy-five or more people in public places; and other organized activities involving seventy-five or more persons involving the use of, or having an impact on, public property or facilities. LBMC § 5.60.010(I)(1)-(3); Long Beach Administrative Regulation ("AR") 8-28(IV)(A)(2) (2007). To the extent that the Ordinance regulates the use of public parks, sidewalks, and streets we analyze its provisions under the standard for traditional public fora.

3. Regulation by Prior Restraint

Prior restraints on speech are disfavored and carry a "heavy presumption" of invalidity. *Forsyth County,* 505 U.S. at 130. "This heavy presumption is justified by the fact that 'prior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights.'" *Grossman,* 33 F.3d at 1204 (alteration in *Grossman*) (quoting *Neb. Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976)); *accord Rosen v. Port of Portland,* 641 F.2d 1243, 1246-47 (9th Cir. 1981). The Supreme Court explained in *Ward v. Rock Against Racism,* "[T]he regulations we have found invalid as prior restraints have 'had this in common: they gave public officials the power to

deny use of a forum in advance of actual expression.'" 491 U.S. 781, 795 n.5 (1989) (quoting *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)). A prior restraint need not actually result in suppression of speech in order to be constitutionally invalid. "The relevant question [in determining whether something is a prior restraint] is whether the challenged regulation *authorizes* suppression of speech in advance of its expression. . . ." *Id.*

In *Grossman*, we noted that a permitting ordinance that required a written application before users could hold an organized demonstration in a public park did not fit entirely within "classic prior restraint cases." 33 F.3d at 1205 n.9 (internal quotation marks and citation omitted). But we held nevertheless that the permitting system still bore "a heavy presumption against its constitutional validity." *Id.* at 1204 (internal quotation marks omitted); *see also Forsyth County*, 505 U.S. at 130 (applying a "'heavy presumption'" against validity of a regulation imposing advance fees on parades and assemblies held on public property because it was a "prior restraint" on speech). Section 5.60 is similar to the permitting system in *Grossman*, though it reaches a broader range of conduct. Section 5.60 regulates not only expressive activity in parks located in Long Beach, but also any activity on public streets, sidewalks, and right-of-ways. *See* LBMC § 5.60.010(I)(1). Section 5.60 even regulates events that "involve[ ] the use of, or ha[ve] an impact on, public property or facilities" if such activities are "likely to require

the provision of [enumerated] city services." *Id.* § 5.60.010(I)(3); AR 8-28(IV)(A).

B. Reasonable Time, Place and Manner Restrictions

"[R]easonable time, place, [and] manner restrictions" on speech are permissible. *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 293 (1984). Such restrictions can include permitting requirements for core First Amendment speech in traditional public fora, *id.,* and they are permissible if they satisfy four criteria. As the Supreme Court wrote in *Clark,* "We have often noted that restrictions of this kind are valid provided [1] that they are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information." *Id.* (bracketed numbers added). In *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992), the Court recognized a fourth criterion: a permitting scheme "may not delegate overly broad licensing discretion to a government official."

The first criterion is that the restriction be content-neutral. That is, the restriction must be based on something other than the content of the speech. *Grace,* 461 U.S. at 177. A law is content-based rather than content-neutral if "the main purpose in enacting it was to suppress or exalt speech of a

certain content, or it differentiates based on the content of speech on its face." *ACLU of Nevada v. City of Las Vegas,* 466 F.3d 784, 793 (9th Cir. 2006). Though "an improper censorial motive" is sufficient, such a motive is not necessary to render a regulation content-based. *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.,* 502 U.S. 105, 117 (1991). If a regulation "distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed," it is content-based. *Foti v. City of Menlo Park,* 146 F.3d 629, 636 (9th Cir. 1998) (internal quotation marks omitted).

A content-based regulation is generally subject to strict scrutiny. The government therefore "must show that its regulation is necessary to serve a compelling state interest," *Perry Educ. Ass'n,* 460 U.S. at 45, and that the regulation uses "the least restrictive means to further the articulated interest," *Foti,* 146 F.3d at 636. "[A] *content-based* restriction on *political speech* in a *public forum* . . . must be subjected to the most exacting scrutiny." *Boos v. Barry,* 485 U.S. 312, 321 (1988).

Under the second criterion, the government must show: (1) that the governmental interest is substantial and "unrelated to suppression of expression," *Baldwin v. Redwood City,* 540 F.2d 1360, 1365 (9th Cir. 1976); and (2) that the regulation is narrowly tailored to meet that interest, *Ward,* 491 U.S. at 797.

The first aspect is substantial governmental interest. The Supreme Court has recognized substantial governmental interests in regulating competing uses of public fora, *Forsyth County,* 505 U.S. at 130, in maintaining parks in an "attractive and intact condition," *Clark,* 468 U.S. at 296, in regulating "streets to protect and insure the safety, comfort, or convenience of the public," *Murdock v. Pennsylvania,* 319 U.S. 105, 116 (1943), and in collecting nominal fees to "defray the expenses of policing" the regulated activity, *id.* at 113-14. We have also recognized as a substantial governmental interest the need to "provide notice to the municipality of the need for additional public safety and other services." *Food Not Bombs,* 450 F.3d at 1042. Although the public safety interests in regulating street use are substantial, "those interests must give way on occasion to the temporary dedication of the streets to picketing and parading." *ACORN,* 798 F.2d at 1267 n.5.

Three questions guide courts in analyzing narrow tailoring, the second aspect. First, does the regulation achieve its ends without restricting substantially more speech than necessary? This "requirement . . . is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward,* 491 U.S. at 799 (quoting *United States v. Albertini,* 472 U.S. 675, 689 (1985)) (second alteration in *Ward*). Expansive language can signal the absence of "a close fit with the governmental interests underlying the permitting requirement."

Food Not Bombs, 450 F.3d at 1040-42 (comparing a restriction that applies if an activity "may" implicate a governmental interest with a restriction that applies if the activity is "likely" to affect the interest). Second, are there obvious alternatives that would achieve the same objectives with less restriction of speech? A city is not required to select the least restrictive alternative, but "an assessment of alternatives can still bear on the reasonableness of the tailoring." *Menotti v. City of Seattle,* 409 F.3d 1113, 1131 n.31 (9th Cir. 2005); *see also City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 417 n.13 (1993). Third, is a generic regulation needed "as applied to other speakers," even if it is not needed in the case at hand? *Galvin v. Hay,* 374 F.3d 739, 753 (9th Cir. 2004). This question addresses "[t]he multiplied effect of" a particular expressive activity "if many other organizations likewise decided to engage in this activity on a pervasive or regular basis." *ACORN,* 798 F.2d at 1270; *see also Clark,* 468 U.S. at 296-97.

The third criterion applicable to time, place and manner restrictions is that regulations "must leave open ample alternatives for communication." *Forsyth County,* 505 U.S. at 130. Several considerations are relevant to this analysis. First, "[a]n alternative is not ample if the speaker is not permitted to reach the intended audience." *Bay Area Peace Navy v. United States,* 914 F.2d 1224, 1229 (9th Cir. 1990) (internal quotation marks omitted); *see also Menotti,* 409 F.3d at 1138. Second, if the location of the expressive

activity is part of the expressive message, alternative locations may not be adequate. *Galvin,* 374 F.3d at 756; *ACORN,* 798 F.2d at 1267 n.5. Third, we consider the opportunity for spontaneity in determining whether alternatives are ample, particularly for political speech. *City of Richmond,* 743 F.2d at 1356. Fourth, we consider the cost and convenience of alternatives. *City of Ladue v. Gilleo,* 512 U.S. 43, 57 (1994).

Finally, the fourth criterion is the prohibition on regulations that confer unbridled discretion on a permitting or licensing official. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150-51 (1969). Regulations must contain "narrow, objective, and definite standards to guide the licensing authority," *id.,* and must require the official to "provide [an] explanation for his decision," *Forsyth County,* 505 U.S. at 133. The standards must be sufficient to "render [the official's decision] subject to effective judicial review." *Thomas v. Chi. Park Dist.,* 534 U.S. 316, 323 (2002). This requirement applies to an official's "authority to condition the permit on any additional terms" not stated in the ordinance. *City of Lakewood,* 486 U.S. at 772.

V. Analysis of § 5.60

A. Description of the Ordinance

Section 5.60 requires groups to obtain city-issued permits in order to hold "special events" as defined in

the Ordinance.[1] LBMC § 5.60.020(A). Permits for special events not involving expressive activity require at least sixty days advance notice to the City. By contrast, permits for special events involving expressive activity require between three and ten days advance notice, depending on the location of the planned event. *Id.* § 5.60.040. Certain events are exempt from the special event permit requirement. Those events include funeral processions; activities conducted by governmental agencies; filming activities governed by another provision of the municipal code; and "spontaneous parades, assemblies or demonstrations involving expressive activity" occasioned by events coming into public knowledge within five days of the event. *Id.* § 5.60.030(A).

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[1] The City has asked us to take judicial notice of the Santa Monica ordinance and the City's recent amendment to § 5.60 concerning the definition of special events. We agree to take judicial notice of the Santa Monica ordinance. *See Food Not Bombs,* 450 F.3d at 1025 n.2 (citing *Newcomb v. Brennan,* 558 F.2d 825, 829 (7th Cir. 1977)). We also agree to take judicial notice of the new definition of special events contained in subsection .010, as interpreted by Long Beach Administrative Regulation AR 8-28, promulgated on February 7, 2007. *Id.* at 1031-32; *see also City of Lakewood,* 486 U.S. at 770 (describing the requirements for an administrative regulation to affect constitutional analysis). As we stated in *Food Not Bombs,* "[w]e review only the present version of the ordinance and implementing regulations." 450 F.3d at 1025. We also note that in an order filed on January 23, 2007, this court granted the City's motion to take judicial notice of Chapter VII of the Chicago Park District Code.

The City Manager "shall" grant a permit for a special event if certain criteria are satisfied. *Id.* § 5.60.040(J)(1)-(13). The City Manager "may" deny or revoke a permit if certain other criteria are satisfied. *Id.* § 5.60.070(A)(1)-(15), (B). A permittee must agree to hold harmless and indemnify the City and its officers and employees against a broad range of claims and harms, and must, under certain circumstances, obtain insurance. *Id.* § 5.60.080. A permittee must pay both a permit fee and "departmental services charges" to the City unless they are funded or waived by the City Council. *Id.* §§ 5.60.050, 5.60.090.

Departmental services charges are "the actual costs which a department of the city incurs in connection with activities for which a permit is required," including

> costs associated with fire safety, traffic and/or pedestrian control, water safety, the closure of streets or intersections, the diverting of traffic, the salaries of city personnel involved in administration or coordination of city services for the event, the cost to the city to provide support personnel, equipment, materials and supplies, and related city costs such as fringe benefits or employee overtime.

Id. § 5.60.010(C). Departmental services charges do not include "costs incurred by the city to provide police protection to those engaged in 'expressive activity.'" *Id.* However, other costs associated with

expressive activities – beyond those associated with "police protection" – are included in departmental services charges.

"Spontaneous" events are exempt from the permitting requirement applicable to special events. An organizer of a spontaneous event must provide at least twenty-four-hour advance notice to the City. *Id.* § 5.60.030(A)(5). The City Manager may impose "reasonable time, place and manner restrictions" on a spontaneous event. *Id.* § 5.60.030(B). Further, the City Manager may deny permission to hold a spontaneous event, based on the same criteria applicable to permits for special events. *Id.* §§ 5.60.030(C), 5.60.070. An organization holding a spontaneous event is not required to pay the permit application fee applicable to special events. *Id.* §§ 5.60.040(F), 5.60.030(A)(5). However, that organization may be required to pay departmental services charges unless those charges are funded or waived by the City Council.

The Peace Network challenges nine features of § 5.60, appearing in a number of subsections of the Ordinance. We first address five features that we hold are constitutional. We then address four features that we hold are unconstitutional in whole or in part.

B. Constitutional Features of § 5.60

1. Expressive Activity Distinctions

The Peace Network argues that certain provisions distinguishing between "expressive activity" and other activity are impermissibly content-based because they provide for differential treatment of activities based on the messages those activities seek to convey.

"'Expressive Activity' means conduct, the sole or principal object of which is the expression, dissemination or communication by verbal, visual, literary or auditory means of opinion, views or ideas. Expressive activity includes, but is not limited to, public oratory and the distribution of literature." *Id.* § 5.60.010(D). It is true that some provisions of § 5.60 distinguish between expressive and non-expressive activity. *E.g., id.* § 5.60.010(C) (prohibiting the City Manager from imposing departmental services charges for costs incurred by the City to provide police protection to people engaged in expressive activity); *id.* § 5.60.020(D) (prohibiting the City Manager from imposing conditions on permits "in a manner that will unreasonably restrict expressive or other activity protected by the California or United States constitutions"); *id.* § 5.60.040(G) (requiring the City Manager to act on completed applications for permits involving expressive activities within two business days, to provide the applicant with written notice explaining the reasons for any denial or conditional approval, and to consult with the city attorney before denying

or conditionally approving a permit involving expressive activity).

However, we conclude that these distinctions between expressive activities and non-expressive activities are permissible. These subsections of § 5.60 are "justified without reference to the content of the regulated speech." *See Clark,* 468 U.S. at 293. These subsections do not show that the City has "adopted [the] regulation of speech because of disagreement with the message it conveys." *See Ward,* 491 U.S. at 791. Here, the opposite is true, for "the permissive nature of the [exceptions favoring expressive activity] furthers, rather than constricts, free speech." *See Thomas,* 534 U.S. at 325. All of the provisions "treat[] expressive events more favorably than others." *Food Not Bombs,* 450 F.3d at 1037; *cf. Burk v. Augusta-Richmond County,* 365 F.3d 1247, 1254-55 (11th Cir. 2004) (finding an ordinance restricting public gatherings to be unlawfully content-based because it was "directed only to communicative activity, rather than to all activity, and its applicability turn[ed] *solely* on the subject matter of what a speaker might say").

Further, the Ordinance does not "single[] out certain speech for differential treatment based on the idea expressed," *see ACLU of Nevada,* 466 F.3d at 794 (internal quotation marks omitted), and it does "not distinguish *among* the expressive events based on their content," *see Food Not Bombs,* 450 F.3d at 1037. Identifying "expressive activity" protected by the First Amendment can sometimes be difficult. *See, e.g.,*

Texas v. Johnson, 491 U.S. 397, 399 (1989) (holding, in a 5-4 decision, that flag burning is protected activity under the First Amendment). But such difficulty arises from the nature of the constitutionally protected speech and the heightened protection provided by the First Amendment. *See, e.g., Murdock,* 319 U.S. at 115 ("A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the . . . merchandise of . . . peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of . . . speech . . . [is] in a preferred position."). It does not follow that those subsections of § 5.60 that treat expressive activity more favorably than non-expressive activity are impermissibly content-based. Indeed, we recently held in *Food Not Bombs* that comparable provisions of Santa Monica's ordinance, distinguishing between "expressive" and "non-expressive" events, were permissible. 450 F.3d at 1037. Following *Food Not Bombs,* we so hold for these subsections of 5.60 as well.

2. Conditions on Permits for Special Events

The Peace Network argues that § 5.60.020(D) gives the City Manager unbridled discretion to impose conditions on permits to hold special events. We disagree. This subsection allows the City Manager to impose conditions on permits only to achieve specified purposes. It provides:

> The city manager may condition any permit . . . with *reasonable requirements* concerning the time, place or manner of holding such event *as is necessary to coordinate multiple uses of public property, assure preservation of public property and public places, prevent dangerous, unlawful or impermissible uses, protect the safety of persons and property and to control vehicular and pedestrian traffic in and around the venue,* provided that such requirements shall not be imposed in a manner that will unreasonably restrict expressive or other activity protected by the California or United States constitutions.

LBMC § 5.60.020(D) (emphasis added). The subsection then goes on to provide a non-exhaustive list of conditions that the City Manager may impose to achieve these specified purposes. These conditions include "accommodation of an event's pedestrian and vehicular traffic, including restricting events to city sidewalks, portions of a city street, or other public right-of-way," "provision of a waste management plan, and the clean up and restoration of the site of the event," and "reasonable designation of alternate sites, times, dates, or modes for exercising expressive activity." *Id.* § 5.60.020(D)(2), (9), (13).

The purposes specified in § 5.60.020(D) for imposing conditions on permits are objective and relatively precise, and have no discernable connection to the content of any particular message. *Compare City of Lakewood,* 486 U.S. at 753-54, 770 (striking down as allowing unbridled discretion a city ordinance

allowing the mayor to impose "any other terms and conditions deemed necessary and reasonable" (internal quotation marks omitted)), *with United States v. Linick,* 195 F.3d 538, 541 (9th Cir. 1999) (upholding a law allowing imposition of "terms and conditions as the authorized officer deems necessary to . . . otherwise protect the public interest" (alteration in original; internal quotation marks omitted)). Further, the subsection authorizes only "reasonable requirements" that are "necessary" to serve the specified purposes, and provides that any such requirements must not "unreasonably restrict" expressive activity. *See Menotti,* 409 F.3d at 1145 n.63; *S. Or. Barter Fair,* 372 F.3d at 1139-41. We also note that § 5.60.040(G) requires the City Manager to consult with the City Attorney and to provide to an applicant a written explanation for a decision that imposes conditions on the permit. *See* LBMC § 5.60.040(G). Finally, we note that §§ 5.60.130(A) and .040(E) allow, in the alternative, a direct appeal of a permitting decision to either the City Council or state court.

We therefore conclude that § 5.60.020(D) does not confer "unbridled discretion" on the permitting authority to impose conditions in violation of the First Amendment. Although the provision has survived this facial challenge, it might nonetheless be vulnerable to an as-applied challenge if, in its implementation, there emerged "a pattern of unlawful favoritism," *see Thomas,* 534 U.S. at 324-25; *see, e.g., Shuttlesworth,* 394 U.S. at 156-59; *Cox v. New Hampshire,* 312 U.S. 569, 575-77 (1941), or if it

resulted in an impermissibly burdensome time, place or manner restriction, *see, e.g., Galvin,* 374 F.3d at 747 n.5, 752-56; *One World One Family Now v. City & County of Honolulu,* 76 F.3d 1009, 1012 (9th Cir. 1996).

3. Proof of Indigent Status

The Peace Network also challenges as allowing unbridled discretion § 5.60.050(B), which allows the City Manager to require "relevant information and documentation as may, in the opinion of the city manager or his/her designee, be reasonably necessary to verify" the indigent status of a person.[2] The validity of § 5.60.090(E), which imposes departmental services charges on a permittee unless he or she qualifies as an "indigent natural person," depends in part on the constitutionality of subsection .050(B). LBMC §§ 5.60.050(B), .090(E).

Section 5.60.050(B) defines an "indigent natural person" to include any person who is "eligible for county relief and support" under the California Welfare and Institutions Code, but the definition "is not limited to" such persons. *Id.* § 5.60.050(B). An indigent natural person who desires to engage in

[2] The Peace Network's other challenge to § 5.60.050 addresses the provision that a permit applicant must pay a fee that is established by the City Council through a resolution unless the City Council waives the fee. We address the waiver provision in Part V.C.4, *infra,* regarding fees and departmental services charges.

expressive activity may request a waiver of the permit application fee imposed by subsection .050.[3] *Id.* We conclude that the eligibility provision does not confer unbridled discretion on the City Manager.

First, the definition of indigency based on the California Welfare and Institutions Code is content-neutral and objective. Section 5.60.050(B) allows the City Manager to determine which "relevant information and documentation" is "reasonably necessary to verify [indigency] status." *Id.* § 5.60.050(B). But the documentation requirements do not affect the definition of indigency. Rather, they merely give flexibility to the City Manager in determining whether a particular applicant has satisfied the criteria of the definition. We do not regard this flexibility as providing the sort of unbridled discretion that would invalidate the section. A person's indigent status is not always readily ascertainable. Proof of such status may come in many forms, depending on the circumstances of the applicant. Coupled with this array of potential forms of proof is the City's interest in verifying that an applicant requesting a fee waiver is indeed indigent. The Ordinance, which limits the City

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[3] The term "indigent natural person" is used in the same fashion in LBMC § 5.60.090(E). That section imposes departmental services charges on permittees unless they qualify as an "indigent natural person." *See* LBMC § 5.60.090(E). We reach the same conclusion under that provision as we do here: The City Manager's ability to request "relevant information and documentation" to prove indigent status does not give the public official unbridled discretion.

to "relevant information" that is "reasonably necessary," adequately ensures that the choice of means of proof is not left to the "whim" of the City Manager. *Id.* § 5.60.050(B); *cf. S. Or. Barter Fair,* 372 F.3d at 1139.

Requiring additional limitations governing the type of documentation the City Manager may request as proof of indigency would be, in the words of Justice Scalia, "insisting upon a degree of rigidity that is found in few legal arrangements." *See Thomas,* 534 U.S. at 325. Moreover, the indigency provisions are designed to "further[], rather than constrict[], free speech," *see id.*, and therefore should be construed favorably in the absence of evidence of a pattern of abuse.

The Peace Network makes a related challenge to the indigency exception, contending that the definition of indigent natural person, which "is not limited to" a person eligible for county relief, vests the City Manager with unbridled discretion to decide who else may qualify for the exemption. We disagree. Indigency is a common term with a well understood definition. One may disagree, within certain limits, about the level of income or assets needed to qualify as an indigent under the Ordinance, but the disagreement will be in a fairly narrow range. Further, the Ordinance has given a baseline in specifying that persons "eligible for county relief" qualify as indigent. We therefore conclude that the definition of indigent natural person does not confer unbridled discretion. Like the documentary provisions, the expansive definition is designed to further, rather than to

restrict, free speech and therefore should be construed favorably.

We also note that if the application is denied, the City Manager must provide the applicant with a statement explaining the reasons for denial. LBMC § 5.60.070(C). The applicant has the opportunity to appeal the denial to the City Council, *id.* § 5.60.130(A), or, if the applicant has applied for a special event permit fewer than thirty days before the event, directly to state court, *id.* § 5.60.040(E). For these reasons, the proof of indigency provision does not give the City Manager unbridled discretion in violation of the First Amendment.

4. Insurance Requirement

Section 5.60.080(B) provides that permittees must "procure and maintain [an insurance policy] in full force and effect during the term of the permit." The Peace Network argues that this provision is content-based and allows public officials to exercise unbridled discretion. We disagree.

Section 5.60.080(C) authorizes the City Manager to waive the insurance requirement if he determines that the planned event does not present a "substantial or significant public liability or property damage exposure for the city or its officers[.]" Further, § 5.60.080(D) provides an exception to the insurance requirement, stating that it "shall not be construed to apply to parades or special events . . . involving expressive activity which enjoy protection

under the United States or California constitutions[.]" To qualify for this exception, such

> parades or special events shall be required to either: (1) agree to indemnify, protect, defend and hold harmless the city, its officers and employees against all claims, damages, expenses, loss or liability of any kind or nature whatsoever arising out of, or resulting from, the alleged acts or omissions of permittee, its officers, agents or employees in connection with the permitted parade, event or activity; or (2) agree to redesign or reschedule the permitted event to respond to specific risks, hazards and dangers to the public health and safety identified by the city manager as being reasonably foreseeable consequences of the permitted parade or special event[.]

Id.

In *Food Not Bombs*, we examined Santa Monica's similar insurance requirement. 450 F.3d at 1056-57 (Kleinfeld, J., writing for the majority); *id.* at 1049-52 (Berzon, J., dissenting in part). The Santa Monica ordinance required permittees to obtain insurance "that the Risk Manager determines to be necessary and adequate under the circumstances" for demonstrations and parades. *Id.* at 1028 (Berzon, J., maj. op.) (internal quotation marks omitted). The ordinance exempted expressive events from the insurance requirement, so long as the organizers indemnified the city, "unless there is a specific, demonstrable history of personal injury or property damage claims

being awarded against the applicant attributable to the applicant's conduct of previous events in the City that are similar in nature to the proposed event." *Id.* (internal quotation marks omitted).

The majority of the panel upheld the insurance requirement, concluding that it was content-neutral. *Id.* at 1057 (Kleinfeld, J., writing for the majority). Judge Berzon, writing for herself, would have struck down the requirement as content-based. *Id.* at 1051-52 (Berzon, J., dissenting in part). The majority observed that

> [p]olitical demonstration organizers can . . . avoid . . . the insurance provision if they cooperate with the City Manager to design the event "to respond to specific risks, hazards and dangers to the public health and safety identified by the City Manager . . . as being reasonably foreseeable consequences of the permitted event." Thus, most demonstration organizers will not have to provide insurance and even those with a destructive history can avoid the insurance requirement if they choose to work with the City Manager to avoid repetition of past injuries or property damage.

Id. at 1057 (footnote and citation omitted).

The Peace Network argues that by authorizing the Long Beach City Manager to determine whether insurance is required, the Ordinance requires the City Manager to evaluate the content of the message that is conveyed. While we conclude below that the

indemnification provision in § 5.60.080(A), which applies to "[e]ach permit," is invalid in the sense that the City may not require a permit applicant to provide indemnification, we conclude that a city may authorize a permit applicant to provide, at the applicant's option, indemnification as an alternative to insurance. Moreover, Long Beach leaves permit applicants with another alternative if they wish to hold their planned event – they may redesign the event. We see nothing to distinguish the LBMC insurance requirement from the insurance requirement we upheld as content-neutral in *Food Not Bombs*. The redesign language in § 5.60.080(D) is nearly identical to the language of the alternative evaluated in *Food Not Bombs*. Therefore, because a "valid . . . alternative" exists, "the insurance provision . . . present[s] no constitutional problem." *Food Not Bombs*, 450 F.3d at 1049-50; *cf. id.* at 1049-50 (Berzon, J., dissenting in part) (stating that with a valid indemnification alternative the insurance provision at issue "would present no constitutional problem").

The Peace Network also argues that § 5.60.080(D) gives the City Manager unbridled discretion to impose or waive insurance requirements. However, the subsection states that the insurance provision "shall not be construed to apply" to expressive activities that qualify for the exemption. The words "shall not" do not connote discretion to require insurance for parades and special events involving expressive activities. If the availability of the exemption is

triggered because the event involves expressive activity, there are three alternatives: indemnification (which we hold invalid), redesign of the event, or insurance. The Ordinance does not specify who selects between these available options. *See* LBMC § 5.60.080(D). The commonsense reading of this subsection is that the applicant seeking to hold a parade or special event that involves expressive activity may select between the alternatives.

Section 5.60.080(C) is a logical extension of the second alternative in subsection (D). If there is no need to redesign or reschedule an expressive event because it poses no substantial risk of public liability or property damage, then the City Manager can waive the insurance requirement altogether. We read the mandatory language of subsection (D) in conjunction with the permissive language of subsection (C) to require the City Manager to waive the insurance requirement if the event does not present a substantial risk of public liability or property damage, thereby obviating any need to redesign or reschedule the event. It would be absurd to require the City Manager to propose that the event be redesigned or rescheduled in situations where the change is not necessary because the event poses minimal risks of public liability in the first place. Based on this commonsensical reading of the statute, we conclude that the insurance waiver provision provides the City Manager with content-neutral, objective factors which control and direct the City Manager's decision whether to grant a waiver.

We recognize that the Ordinance does not, in terms, require the City Manager to provide an explanation for the decision not to waive the insurance requirement. *See Forsyth County,* 505 U.S. at 133. However, it does require the City Manager to identify the "specific risks, hazards and dangers to the public health and safety" and to propose that the organizers "redesign or reschedule" the event in response to those risks. LBMC § 5.60.080(D). This communication constitutes a sufficient explanation of the City Manager's decision. We also recognize that the Ordinance allows "any person aggrieved by the issuance, denial, or revocation of a permit" to appeal the decision to the City Council to obtain a final determination, which may then be appealed in state court. *Id.* § 5.60.080(A); *see id.* § 5.60.040(E). The Ordinance does not prohibit event organizers from using these methods of review to challenge conditions imposed on permits. *See id.* § 5.60.080(A); *see also City of Lakewood,* 486 U.S. at 772 (applying the unbridled discretion requirements to an official's "authority to condition the permit on any additional terms"). For these reasons, the Ordinance does not afford the City Manager unbridled discretion to exempt an applicant from the insurance requirement.

5. Criminal Liability for Violation of the Ordinance

The Peace Network contends that the Ordinance is unconstitutional because it authorizes criminal liability for unknowing violations of its provisions.

According to the Peace Network, the Ordinance "imposes strict liability on anyone who participates or engages in, or permits another to conduct a special event." The Peace Network has misread the Ordinance. Section 5.60.120 authorizes a misdemeanor penalty, but does so only for a "person who intentionally violates any of the provisions of" § 5.60. LBMC § 5.60.120. To the degree that the Ordinance is otherwise constitutional, a misdemeanor penalty for intentional violation of its provisions does not violate the First Amendment.

C. Unconstitutional Features of § 5.60

1. "Special" Events

A "special event," as defined by the Ordinance, requires a permit issued by the City Manager. There are three categories of special events under the Ordinance. The Peace Network argues that requiring a permit for the second and third categories is unconstitutional. We disagree with its arguments as to the second category, but agree with its argument as to the third category.

A special event requires a permit if it is conducted "in, on or upon any city street, sidewalk, alley, park, way, pier, public place, public property or public right-of-way which is owned or controlled by the city." *Id.* § 5.60.020(A). The Ordinance defines "special event" as:

> 1. Any organized formation, parade, procession, demonstration or assembly which

> may include persons, animals, vehicles, or any combination thereof, which is to assemble or travel in unison on any street, sidewalk or other public right-of-way owned or controlled by the city which does not comply with applicable traffic regulations, laws or controls; or
>
> 2. Any organized assemblage of seventy five (75) or more persons at any public place, property or facility which is to gather for a common purpose under the direction or control of a person; or
>
> 3. Any other organized activity involving seventy five (75) or more persons conducted by a person for a common or collective use, purpose, or benefit which involves the use of, or has an impact on, public property or facilities and which may require the provision of city public services in response thereto.

Id. § 5.60.010(I)(1)-(3). The City recently promulgated a regulation limiting the third category to activities that are "likely to require the provision of city services" for six specified purposes: "street blockage," "erecting barriers," "construction," "traffic control," "crowd control," or "litter abatement (for amounts in excess of that normally expected for the public property or facilities involved)." AR 8-28(IV)(A)(1)-(2).

The Peace Network first argues that because the term "common purpose" in the second category of special event is not defined, "[t]he determination of whether a group is assembled for a 'common purpose'

is, necessarily, a content-based judgment." We disagree.

The "common purpose" language in the second category can be "justified without reference to the content of the regulated speech," *Clark*, 468 U.S. at 293, because the provision applies regardless of whether the people are engaged in an expressive activity and because it furthers the City's interest in receiving advance notice when large groups are planning to assemble so that it may regulate competing uses – a justification unrelated to the content of speech. *See Food Not Bombs*, 450 F.3d at 1042. The language of the category applies when the "organized assemblage" is planning "to gather for a common purpose *under the direction or control of a person.*" LBMC § 5.60.010(I)(2) (emphasis added). Without the common purpose limitation, seventy-five people who happened to be in a park at the same time and who assembled in an organized manner in response to police instructions to move to a different part of the park would require a permit to do so.

The Peace Network next argues that because the second special event category requires a permit for any "organized assemblage" of seventy-five or more people at any public place, without specifying any adverse impact on any substantial governmental interest, it fails the narrow tailoring requirement. *See* LBMC § 5.60.010(I)(1)-(3). We disagree.

The second category encompasses only events that take place "at any public place, property or

facility." *Id.* § 5.60.010(I)(2). Such public places include public open spaces, where we have held that the substantial governmental interests are "only to regulate competing uses and provide notice to the municipality of the need for additional public safety and other services." *Food Not Bombs,* 450 F.3d at 1042. We recognized in *Food Not Bombs* that those governmental interests are significant, holding that "[g]roups of 150 or more, whether demonstrating or playing soccer, are by any measure sufficiently large enough to affect or have an impact on the use of [the City's] public spaces by other citizens and therefore to implicate the City's interest in maintaining the safe and compatible use of limited public open space." *Id.* at 1043 (internal quotation marks omitted). We cautioned, however, that "a substantially lower number may well not comport comfortably with the limited governmental interests at play in public parks and open spaces." *Id.* at 1043 n.17.

The second category of special event applies to groups of seventy-five or more people conducting activities "at any public place, property or facility," exactly half the number we upheld in *Food Not Bombs.* LBMC § 5.60.010(I)(2); *see* 450 F.3d at 1042-43. The Supreme Court has recognized a government's significant interest in managing competing uses when large groups of people intend to use public property. *See Thomas,* 534 U.S. at 322. Although it is a close question, we hold that a group of seventy-five people using a public open space in Long Beach is large enough to warrant an advance notice and

permitting requirement. *See Grossman,* 33 F.3d at 1206. Advance notice and permitting requirements applicable to smaller groups would likely be unconstitutional, unless such uses implicated other significant governmental interests, or where the public space in question was so small that even a relatively small number of people could pose a problem of regulating competing uses. Similarly, advance notice and permitting requirements for the use of much larger open spaces than those regulated by the LBMC might be unconstitutional even for groups of seventy-five. Because we hold that the second category is narrowly tailored in public open spaces, it is necessarily narrowly tailored in other public spaces such as sidewalks and streets, where the governmental interests are stronger. *See Food Not Bombs,* 450 F.3d at 1039 ("[T]he significant governmental interest justifying the unusual step of requiring citizens to inform the government in advance of expressive activity has always been understood to arise only when large groups of people travel together on streets and sidewalks."). *Compare* LBMC § 5.60.010(I)(1) (requiring a permit for groups of any size using sidewalks and streets when the use "does not comply with applicable traffic regulations"), *with id.* § 5.60.010(I)(2) (requiring a permit for groups of seventy-five or more persons "at any public place, property, or facility").

Finally, the Peace Network argues that the third category of special event is not narrowly tailored to serve a substantial governmental interest. We agree.

The distinction between the second category of "special event," defined as "[a]ny organized assemblage of seventy five (75) or more persons at any public place" and the third category of "special event," defined as "[a]ny other organized activity involving seventy five (75) or more persons" in a public place is discernible, but only with some effort. As we construe the Ordinance, an "organized activity" in a public place is not necessarily an "organized assemblage." For example, a group might organize a "5K Fun Run" in which fifty people race. Course monitors, first aid personnel, and spectators might be stationed along the course. This "organized activity" could easily "involv[e] seventy five (75) or more persons" and would be "conducted . . . for a common or collective . . . purpose." LBMC § 5.60.010(I)(3). Yet if the runners, spectators, course monitors, and first aid personnel never gather together in one place, it is possible that this event might never amount to an "organized assemblage of seventy five (75) or more persons." *Id.* § 5.60.010(I)(2).

It is unclear to us whether the third category is confined to events in public places. If it is not so confined, an advance permitting requirement cannot be justified, as it can be for the second category, on the ground of regulating competing uses in such places. But even if the third category is confined to events in public places, it is still not narrowly tailored.

The critical qualifying criterion for inclusion in the third category is that the event "may require the

provision of city public services in response thereto." LBMC § 5.60.010(I)(3). If we look only to the text of the Ordinance, the possibility of requiring the provision of any city public service – no matter how trivial the service – is enough to qualify the event for inclusion in the third category. As indicated above, the City has recently promulgated a regulation in an attempt to narrow the definition of city public services under the third category. The six services listed in the new regulation – any one of which would qualify the event as a special event requiring an advance permit – are "street blockage," "erecting barriers," "construction," "traffic control," "crowd control," and "litter abatement." We hold that this regulation has not sufficiently narrowed the definition of city public services that may be required by an expressive event to satisfy the narrow tailoring requirement.

In *Food Not Bombs,* we upheld an ordinance that required a permit for any "march, procession, walk, run or assembly on public sidewalks or City park paths" that was "likely to [] interfere with the free use of any public way . . . or not comply with traffic regulations." 450 F.3d at 1038-39 (internal quotation marks omitted; second alteration in *Food Not Bombs;* emphasis removed). That is, we held that the permitting requirement was valid to the extent that the event was likely to interfere with the use of public ways or to violate traffic regulations. We think it is also safe to say that a permitting requirement would

be valid to the extent that the event was likely to pose a threat to public safety.

But the third category, described in § 5.60.010(I)(3), even as modified by the recent regulation, includes events that may require nothing more than city public services to deal with litter. The City has offered no argument that litter abatement is a substantial governmental interest. In *Schneider v. New Jersey*, the Supreme Court held that legislation enacted to further the governmental interest in

> keep[ing] the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech[.]

308 U.S. 147, 162 (1939). Unlike the government's interest in regulating competing uses of park space, preserving free use of public ways, enforcing traffic rules or ensuring public safety, the government's interest in litter abatement is not sufficient to justify a prior restraint on an expressive activity through a permitting requirement.

Three of the other specified city public services are clearly related to free use of public ways, traffic violations or public safety, and would thus be permissible bases for requiring advance permits: "street

blockage," "erecting barriers," and "traffic control." The two remaining city public services are less clearly related to substantial governmental interests – "construction" and "crowd control." These two services *could be* sufficiently related, depending on the type and purpose of the construction and crowd control, but a more precise definition would be needed before we could conclude that they were.

The government has the burden of showing that a restriction is narrowly tailored. *Bay Area Peace Navy,* 914 F.2d at 1227. We conclude that the City has failed to carry its burden to show that the definition of the third category of special event, described in § 5.60.010(I)(3) and the accompanying administrative regulation, is narrowly tailored to serve a significant governmental interest.

2. "Spontaneous" Events

"Spontaneous" events are defined as "parades, assemblies or demonstrations involving expressive activity and which are occasioned by news or affairs coming into public knowledge within five (5) days of such parade, assembly or demonstration." LBMC § 5.60.030(A)(5). The Peace Network argues that the provisions governing "spontaneous" events are not

narrowly tailored and do not provide sufficient alternative means of communication.[4] We agree.

Spontaneous events are not subject to the permitting requirements applicable to "special" events. *Id.* However, organizers who wish to hold spontaneous events are required to "give written notice to the city manager at least twenty four (24) hours prior to such parade or assembly." *Id.* The twenty-four-hour advance notice requirement for spontaneous events is less demanding than the three-, five- or ten-day notice requirements for "special" events involving expressive activity. *Id.* § 5.60.040(D) (requiring three-day advance notice for events held on "sidewalks," "parks," or "waterways and piers," five-day notice for "alleys and other rights-of-way other than sidewalks," and ten-day notice for "streets, highways and thoroughfares").

The City Manager may impose "reasonable time, place and manner restrictions" on a spontaneous event. *Id.* § 5.60.030(B). Further, the City Manager may deny permission to hold a spontaneous event based on the same criteria applicable to a special event. *Id.* § 5.60.030(C). Such criteria include, *inter alia,* unreasonable disruption of traffic, unreasonable interference with access to police or fire stations, and

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[4] The Peace Network does not challenge the notice requirements for non-spontaneous events. *Cf. Food Not Bombs,* 450 F.3d at 1043-45.

undue hardship to adjacent businesses or residents. *Id.* § 5.60.070(A).

Courts have considered several factors in determining the validity of requirements applicable to expressive activity in response to late-breaking news or to issues of immediate or urgent concern. These factors include the ability of individuals to respond quickly to events or issues of concern, the scope of the regulation, and available alternative means of expression. *See Food Not Bombs,* 450 F.3d at 1046-47. We consider these factors in turn.

First, as just noted, the Ordinance requires groups to give the City at least twenty-four-hours advance notice before holding a "spontaneous" event. The Supreme Court has observed that "timing is of the essence in politics. . . . [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth,* 394 U.S. at 163. "[T]he change in timing [imposed by an advance notice requirement] will alter the potential impact of [the participants'] speech. For speech that is truly time sensitive, the precise spontaneous moment will be lost." *Food Not Bombs,* 450 F.3d at 1046. "By requiring advance notice, the government outlaws spontaneous expression. Immediate speech can no longer respond to immediate issues." *City of Richmond,* 743 F.2d at 1355; *cf. Ariz. Right to Life Political Action Comm. v. Bayless,* 320 F.3d 1002, 1008 (9th Cir. 2003) ("To suggest that the [twenty-four-hour] waiting period is minimal ignores the reality of breakneck political campaigning and the

importance of getting the message out in a timely, or, in some cases, even instantaneous fashion."). A twenty-four-hour advance notice requirement for a spontaneous event is not categorically unconstitutional. But it may be so, depending on factors such as the definition of a spontaneous event and the availability of alternative means of expression.

Second, a spontaneous event includes all "[s]pontaneous parades, assemblies, or demonstrations involving expressive activity" occasioned by "news or affairs coming into public knowledge within five (5) days of such parade, assembly or demonstration[.]" LBMC § 5.60.030(A)(5). That is, a spontaneous event would be a "special event" requiring a formal permit were it not for the time-sensitivity of the event. A "demonstration" is separately defined in the Ordinance as "any formation, procession or assembly of persons for the purpose of expressive activity, who intend to or do assemble or travel in unison on any street, sidewalk or other public right-of-way owned or controlled by the city in a manner that does not comply with normal or usual traffic regulations, laws or controls." *Id.* § 5.60.010(B). However, "parade" and "assembly" are not separately defined. We may reasonably assume, even without a separate definition, that a "parade" is a procession that takes place on a public street or other public right-of-way.

But the definition of an "assembly" that constitutes a spontaneous event is not so obvious. The definition of a "special event" requiring a permit includes "[a]ny organized assemblage of seventy five

(75) or more persons in any public place, property or facility which is to gather for a common purpose under the direction or control of a person."[5] Because a spontaneous event is the same thing as a special event but for its time sensitivity, we take the definition of "assembly" to be at least as broad as "organized assemblage." The definition of "assembly" may well be broader, but for present purposes that does not matter, for the definition of organized assemblage includes assemblies that take place on the lawn in front of a city hall, in a public park, on a publicly owned soccer field, or possibly even on a privately owned but publicly accessible open space. Thus, the spontaneous event regulation – and the twenty-four-hour advance notice requirement – apply to assemblies in places where there is no threat of disruption of the flow of pedestrian or vehicular traffic.

Third, alternative means of expression are limited for people who cannot comply, or who could comply only with difficulty, with the twenty-four-hour

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[5] The definition of a special event also includes "[a]ny other organized activity involving seventy five (75) or more persons conducted by a person for a common or collective use, purpose or benefit which involves the use of, or has an impact on, public property or facilities and which may require the provision of city or public services in response thereto." We hold that this definition of special event is unconstitutional because it is not narrowly tailored. *See supra* Part IV.C.1. We do not rely on this definition for purposes of determining the definition of "assembly," as that term is used in defining a spontaneous event.

advance notice requirement. We wrote in *Food Not Bombs,* "[T]o comport with the First Amendment, a permitting ordinance must provide some alternative for expression concerning fast-breaking events." 450 F.3d at 1047. Therefore, we "consider . . . whether the [LBMC] advance notice requirement, including the spontaneous expression exception, overall provides adequate alternatives for expression, both planned and spontaneous." *Id.* at 1046; *see also Ctr. for Fair Pub. Policy v. Maricopa County,* 336 F.3d 1153, 1170 (9th Cir. 2003) ("The Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting." (citation and internal quotation marks omitted)).

We conclude that the regulation of "spontaneous" events under the Ordinance is not narrowly tailored to regulate only events in which there is a substantial governmental interest in requiring such advance notice. The regulation requires twenty-four-hour advance notice irrespective of whether there is any possibility that the event will interfere with traffic flow. Further, the regulation fails to provide ample alternative means of communication for people wishing to participate in spontaneous expressive events.

The regulation of spontaneous events under the Ordinance stands in stark contrast to the Santa Monica spontaneous event regulation that we recently

upheld in *Food Not Bombs*. There, "with respect to time-sensitive speech," large groups had three alternatives to providing notice before such an event. First, the City Hall lawn was open to any group wishing to engage in speech. *Food Not Bombs*, 450 F.3d at 1048. Second, a "safe harbor provision" described formations for sidewalk marches that would not require a permit and that would be available for "groups as large as 1,999." *Id.* Third, the ordinance explicitly exempted "unorganized" gatherings from the provisions. *Id.* at 1049; *see City of Richmond*, 743 F.2d. at 1355-56 ("[T]he delay inherent in advance notice requirements inhibits speech. By requiring advance notice, the government outlaws spontaneous expression. Immediate speech can no longer respond to immediate issues. The quantity of effective speech is limited.").

3. Hold-harmless and Indemnification Clauses

The Ordinance contains a broadly worded clause under which a permittee is required to agree to hold harmless and indemnify the City for harm arising out of the permitted activity. LBMC § 5.60.080(A). The permit application form contains an even more broadly worded clause. These requirements apply to "[e]ach permit" and differ from the indemnification alternative to insurance set forth in § 5.60.080(D). The Peace Network argues that these clauses are unconstitutional because they are not narrowly

tailored to serve a significant governmental interest. We agree.

The hold-harmless and indemnity clause of the Ordinance provides, in relevant part:

> Each permit shall expressly provide that the permittee agrees to defend, protect, indemnify and hold the city, its officers, employees and agents free and harmless from and against any and all claims, damages, expenses, loss or liability of any kind or nature whatsoever arising out of, or resulting from, the alleged acts or omissions of permittee, its officers, agents or employees in connection with the permitted event or activity[.]

LBMC § 5.60.080(A). The permit application form requires not only that permittees agree to hold harmless and indemnify the City for expenses resulting from "acts or omissions" of the "permittee, its officers, agents or employees." It also requires that permittees agree that their "organization will hold the City harmless from *any liability caused by the conduct of the event.*" (Emphasis added.) It states that "[t]he City will not be liable for any mishaps or injuries associated with the event," and goes on to provide that "[f]ull responsibility for activities at the event will be assumed by the organization."

We evaluate not only the text of the Ordinance, but also the manner in which it has been implemented by governing authority. *See Ward,* 491 U.S. at 795-96 (including the administrative implementation

of a challenged provision in the Court's constitutional analysis); *cf. Forsyth County,* 505 U.S. at 131 n.9 (examining the language of a permit application form to determine how the local government interpreted an ordinance provision). The terms "hold-harmless clause" and "indemnity clause" often refer to the same thing – an agreement under which "one party agrees to answer for any . . . *liability* or *harm* that the other party might incur." *Black's Law Dictionary* 784 (8th ed. 2004) (defining "indemnity clause," noting that the clause is "[a]lso termed *hold-harmless clause; save-harmless clause*" (emphasis in original)).

Another provision of the Ordinance provides that "departmental services charges" may be assessed against a permittee, except that such charges may not include a charge for police protection of the permittees. LBMC § 5.60.010(C); *see Forsyth,* 505 U.S. at 133-36; *Food Not Bombs,* 450 F.3d at 1049. The Peace Network has not challenged the assessment of departmental services charges except (as we discuss in the next section) to the extent that the City Manager has unbridled discretion to decide whether such charges will be assessed in a particular case. For purposes of our analysis of the hold-harmless and indemnity clauses, we assume that the assessment of departmental services charges, as those charges are defined in the Ordinance, is permissible. The question before us, therefore, is whether the City may require the permittees to hold harmless and indemnify the City for the remaining costs specified in the clauses.

The clauses, taken together, require permittees (1) to agree to compensate the City for any "damages, expenses, loss or liability . . . arising out of or resulting from the alleged actions or omissions" of permittees; (2) to agree to hold the City harmless for "any liability caused by the conduct of the event" to permittees; and (3) to agree to reimburse the City for "any liability caused by the conduct of the event" to third parties. The phrase "any liability caused by the conduct of the event" is susceptible to a broad reading, encompassing liability caused by the acts or omissions of any person or entity involved in the event, including acts and omissions not only of the permittees but also of the City and third parties.

We conclude that the clauses are not narrowly tailored to serve a substantial governmental interest. In performing our narrow tailoring analysis, we ask whether the clauses serve a substantial governmental interest without restricting substantially more speech than necessary, and whether there are obvious alternatives that would achieve the same objectives while restricting less speech. We hold that the clauses are not narrowly tailored in three respects.

First, the clauses require that the permittees compensate the City for any "damages, expenses, loss or liability . . . arising out of . . . the alleged acts or omissions of permittee." LBMC § 5.60.080(A). The permit application further requires permittees to indemnify the City for any "mishaps or injuries," intentional or otherwise, that are "associated with the event." It is well established that governments may

not "recoup costs that are related to listeners' reaction" to speech. *Forsyth County,* 505 U.S. at 135 n.12. The Supreme Court explained in *Forsyth County* that recouping such costs is unconstitutional because "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Id.* at 134-35. The Ordinance specifically provides that the cost of providing police protection is excluded from "departmental services charges," *see* LBMC § 5.60.010(C), but the clauses would require permittees to compensate the City for more than just "departmental services charges." The indemnification and hold-harmless clauses contain no exclusion for losses to the City occasioned by the reaction to the permittees' expressive activity. The clauses thus allow the City impermissibly to shift some of the costs related to listeners' reactions to speech from the City to the permittees.

Second, the clause contained in the permit application requires that permittees hold the City harmless for "any liability caused by the conduct of the event" – including, under a broad reading of this language, liability of the City to the permittees. That is, the clause requires that the permittees agree, as a condition of obtaining a permit to engage in expressive speech, to forgo recovery on any cause of action they might otherwise have against the City. The clause encompasses not only liability for physical harm to the permittees, but also for deprivation of permittees' constitutional rights. *Compare generally*

Orin v. Barclay, 272 F.3d 1207, 1216 (9th Cir. 2001) (holding in a § 1983 action that state officials were not entitled to qualified immunity for limiting the message of a speaker who was protected by First Amendment). We think it obvious that permittees cannot be required to waive their right to hold the City liable for its otherwise actionable conduct as a condition of exercising their right to free speech.

Third, the clause in the permit application requires that permittees hold the City harmless for "any liability caused by the conduct of the event" to third parties. The permit application requires permittees to take "[f]ull responsibility for activities at the event." The provision requires permittees to assume legal and financial responsibility even for those "activities at the event" that are outside the control of the permittee, indeed including activities of the City. In *NAACP v. Claiborne Hardware Co.,* the Supreme Court reviewed the damages awards from a civil rights boycott in Mississippi and explained that liability for costs arising out of protected expressive activity is limited by the amount of control the speaker exerts over the actors and the message of the speech. 458 U.S. at 916-20. The Court held that "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages," *id.* at 916-17, and declined to impose liability "merely because an individual belonged to a group, some members of which committed acts of violence." *Id.* at

920. The Court wrote that "[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims" because "'[i]n this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."'" *Id.* (quoting *Carroll v. Princess Anne,* 393 U.S. 175, 183-84 (1968)). Requiring permittees to compensate third parties for harm caused by hecklers, counter-protesters, or other persons not part of permittees' organization restricts substantially more speech than the liability found unconstitutional in *Claiborne Hardware. See* 458 U.S. at 916-17, 918-19. Similarly, requiring permittees to compensate third parties for harm caused by acts and omissions of the City impermissibly restricts speech.

The City argues that the clauses should be upheld because we did not strike down similar provisions in *Food Not Bombs.* For two reasons, we disagree. First, the clauses in this case are broader than the provisions upheld in *Food Not Bombs. See* 450 F.3d at 1056 (Kleinfeld, J., writing for the majority). In that case, Santa Monica had imposed a hold-harmless provision that was limited to "all claims, damages, expenses, [and] loss or liability" resulting from "alleged willful or negligent acts or omissions of permittee, its officers, agents, or employees in connection with the permitted event or

activity." *Id.* at 1056 n.10 (internal quotation marks omitted).

Second, although we did not address the issue of narrow tailoring in *Food Not Bombs* because plaintiffs had challenged the provision only on the ground that it was content-based, *id.* at 1058 (Wardlaw, J., concurring), our conclusion in this case is supported by the comments of two of the judges on the *Food Not Bombs* panel. 450 F.3d at 1052 (Berzon, J., dissenting in part); *id.* at 1058 (Wardlaw, J., concurring). Judge Berzon wrote that the indemnification provision in that case was "not narrowly tailored to the governmental interest in protecting the City from bearing costs arising from injuries or other liabilities due to the permittees' wrongful conduct of the event or conditions at the site." *Id.* at 1052 (Berzon, J., dissenting in part). Judge Wardlaw acknowledged that the contention that the provision was not narrowly tailored "might have been the better argument," but in her view, the argument had been waived because the plaintiff had failed to raise it. *Id.* at 1058 (Wardlaw, J., concurring).

4. Funding and Waiver of Permit Fee and Departmental Services Charges

The Ordinance authorizes the imposition of a fee for a permit to hold a "special event," as well as the imposition of "departmental services charges" for costs incurred by the City as a result of either "special" or "spontaneous" events. The Ordinance

allows the City, in its discretion, to fund or waive the permit fee and the departmental services charges. The Peace Network argues that the funding and waiver provision allows the exercise of unbridled discretion and is therefore unconstitutional. We agree.

The Ordinance provides that "a permit fee" "shall be established by the city council by resolution," but that the fee may be "funded or waived by council resolution or ordinance." LBMC § 5.60.050(A). The Ordinance further provides that "departmental services charges" shall be assessed against a "permittee." *Id.* §§ 5.60.090(a), 5.60.010(C). In this context, the term "permittee" appears to include both someone who has been granted a permit to hold a "special event," as well as someone who is exempt from the formal permit process but has been given permission to hold a "spontaneous" event. The Ordinance provides that departmental services charges may be "funded, partially funded or waived by action of the city council." *Id.* § 5.60.090(A). The Ordinance does not specify criteria for determining whether those fees and charges will be funded or waived by the City Council.

We note at the outset that the unbridled discretion argument is somewhat unusual in this case. Here, the discretion to fund or waive the fees and charges rests in the hands of the City Council – the elected, legislative body of the City. Unbridled discretion challenges typically arise when discretion is delegated to an administrator, police officer, or

other executive official. *See, e.g., Thomas,* 534 U.S. at 318 (Chicago Park District); *Forsyth County,* 505 U.S. at 132 (county administrator); *Cox,* 312 U.S. at 576 (licensing board); *Menotti,* 409 F.3d at 1144 (police officers); *S. Or. Barter Fair,* 372 F.3d at 1137 (Department of Human Services); *Linick,* 195 F.3d at 542 (Forest Service). *But see City of Richmond,* 743 F.2d at 1357 (City Council). Delegation in the administrative law context refers to delegation of legislative authority to the executive branch. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). In the First Amendment context, some of the delegation of authority concerns are the same, such as lack of accountability and inability to obtain effective judicial review. *See Freedman v. Maryland,* 380 U.S. 56, 57 (1965). Two other concerns, largely unrelated to delegation, are relevant to our First Amendment analysis: the need for narrow tailoring, *Gaudiya Vaishnava Soc'y,* 952 F.2d at 1065, and the desire to eliminate the opportunity for officials to engage in content-based discrimination through the exercise of discretion, *Forsyth County,* 505 U.S. at 133. Those concerns are relevant to a First Amendment analysis even if the discretion remains with a legislative body and has not been delegated to an administrative official.

The permitting scheme of the Ordinance requires organizers to come to the City for permission to hold an expressive event. If a legislative body retains discretion to make an important decision as part of that permitting scheme – here, whether to fund an event or to waive fees and charges – that discretion is

distinct from the general discretion a legislative body has to enact (or not enact) laws. Absent a preexisting permitting scheme, a city council could not in advance impose service charges or other fees on a group seeking to hold a demonstration in a public forum. *Cf. Simon & Schuster, Inc.*, 502 U.S. at 115-16; *Rust v. Sullivan*, 500 U.S. 173, 194-95, 199-200 (1991). The Long Beach City Council's reserved authority to waive or fund charges is thus unlike its usual legislative authority. We conclude that in the First Amendment context, where a legislative body has enacted a permitting scheme for expressive conduct but has reserved some decisionmaking authority for itself under that scheme, that reserved authority is vulnerable to challenge on grounds of unbridled discretion.

Our conclusion is supported by *Shuttlesworth v. City of Birmingham*, in which the Supreme Court evaluated an ordinance requiring participants in parades and other public demonstrations to obtain a permit from the "City Commission," 394 U.S. at 148, which was "the governing body of the City of Birmingham," *Shuttlesworth v. City of Birmingham*, 281 Ala. 542, 544 (1967). The Court concluded that because the city's "ordinance . . . conferred upon the City Commission virtually unbridled and absolute power to prohibit" parades and demonstrations, *Shuttlesworth*, 394 U.S. at 150, it was facially unconstitutional. *See id.* at 151. The Tenth Circuit reached a similar conclusion in *Association of Community*

Organizations for Reform Now (ACORN) v. Municipality of Golden, 744 F.2d 739, 747 (10th Cir. 1984). The court held that the exercise of unbridled discretion by a city council in a permitting scheme was unconstitutional. It wrote:

> We fail to see how it matters for First Amendment purposes whether unguided discretion is vested in the police or the city council. Vesting either authority with this discretion permits the government to control the viewpoints that will be expressed. Whether the city council or the police exercise this power, we believe that it runs afoul of the basic principle that "forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others."

Id. at 747 (quoting *Taxpayers for Vincent,* 466 U.S. at 804). We disagree with the apparently contrary conclusion of the California Court of Appeal in *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach,* 14 Cal. App. 4th 312, 344 (1993) ("It is not a delegation of power to an official but a recognition of the innate authority of the City's legislative body. The city council has the power to grant special permits, and to amend Chapter 5.60; the mere existence of that potential does not present a case of unguided discretion.").

The City has pointed to no provision of the Ordinance, or to any implementing regulation, that guides the City Council's decision whether to fund or

waive fees and charges. The lack of specific articulated bases for making this decision compels the conclusion that the City Council has unconstitutional unbridled discretion. *See City of Richmond,* 743 F.2d at 1357 ("The dangers of discretion are particularly evident in parade permit schemes, where waivers will often be sought for politically controversial causes. It is precisely when political and social pressures are most likely to affect decisionmaking that objective standards to govern discretion are most essential." (internal quotation marks omitted)). The City argues, based on *Thomas,* that because the waiver provision is permissive it cannot be an unconstitutional infringement on speech. In *Thomas,* the Supreme Court held that the "permissive nature" of a provision that allowed city officials to grant a permit for an expressive event despite an application's "fail[ure] to meet . . . technical requirements," so long as a waiver did not harm the "policies furthered by the application requirements," was not unconstitutional. 534 U.S. at 325. The Court wrote that the provision "furthers, rather than constricts, free speech." *Id.* The Court added, "Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements." *Id.* The challenged provision in *Thomas* is strikingly dissimilar to the provision in our case. In *Thomas,* the provision operated only in the narrow circumstance where the permit application was

technically deficient. The provision then provided a generous criterion for forgiving the technical defect and allowing the event to go forward despite the defect. By contrast, this Ordinance authorizes the City Council to decide whether to fund or waive fees and charges for all permissive events subject to the Ordinance, not limited to events for which a permit application was technically deficient, and authorizes the City Council to make that decision with no governing criteria whatsoever.

The City argues that the City Council has not, in fact, used its authority to fund or waive fees and charges based on the content of the expressive activity. Even if this were so, it would be irrelevant. The question is not whether a city has unlawfully favored certain messages or certain kinds of speech. The question is whether the ordinance in question allows the City to do so. A presumption that a city official "will act in good faith and adhere to standards absent from the ordinance's face . . . is the very presumption that the doctrine forbidding unbridled discretion disallows." *City of Lakewood,* 486 U.S. at 770.

Although we need not do so for the disposition of this case, we note that, contrary to the City's argument, the record contains evidence of content-based favoritism. The Peace Network held two similar events, separated by less than two months, both with at least 1,000 attendees. For the February event, held before the United States initiated hostilities in Iraq, and attended by government officials, the City

assessed no fee or charges. For the March event, held after the commencement of hostilities in Iraq and *not* attended by government officials, the City assessed charges of $7,041. This favoritism is a manifestation of the very dangers inherent in unbridled discretion.

The Peace Network does not argue that, in the absence of unbridled discretion, the provisions allowing the assessment of fees and charges are unconstitutional. We therefore do not address the issue whether, absent the authority to exercise unbridled discretion to fund or waive the fees and charges, the provisions allowing their assessment are narrowly tailored and allow ample alternatives for speech.

VI. Severability

The district court found that Section 5.60 was a content-based restriction on free speech and issued a permanent injunction against enforcement of the Ordinance in its entirety. We conclude that some features are constitutional and that others are unconstitutional. The parties did not brief the issue of severability before the district court or this court. Severability of a local ordinance is a question of state law. *City of Lakewood,* 486 U.S. at 772; *Tucson Woman's Clinic v. Eden,* 379 F.3d 531, 556-57 (9th Cir. 2004) (as amended). We remand so that the district court may conduct the severability analysis in the first instance after briefing from the parties.

VII. Conclusion

For the foregoing reasons, we hold that some features of LBMC § 5.60 are constitutional and that others are unconstitutional. We remand to the district court for further proceedings consistent with this opinion.

AFFIRMED in part; REVERSED in part; REMANDED.

BERZON, Circuit Judge, concurring:

I concur fully in Judge Fletcher's opinion.

I continue to believe that an insurance requirement of the kind imposed by Long Beach is potentially content-based, and therefore invalid. The Long Beach ordinance does not limit the requirement to insurance policies priced solely on the size and location of the special event. *See Thomas v. Chicago Park Dist.*, 227 F.3d 921, 925 (7th Cir. 2000) (upholding an insurance requirement where "[t]he required amount and the cost of the insurance depend only on the size of the event and the nature of the facilities involved in it (a bandstand, stage, tents, and so forth)"), *aff'd on other grounds*, 534 U.S. 316 (2002). Instead, the ordinance requires the purchase of insurance even if, as could well be the case, the insurance premium reflects the insurer's assessment of the connection between the risk of loss and the content of the insured's expressive activity. For that reason, were I free to do so, I would follow the

substantial case law holding such an insurance requirement unconstitutional as a violation of the First Amendment. *See Santa Monica Food Not Bombs v. City of Santa Monica* ("*Food Not Bombs*"), 450 F.3d 1022, 1049-52 (9th Cir. 2006) (Berzon, J., dissenting in part); *id.* (citing cases invalidating insurance requirements for public forum permits as content-based).

I fully expressed this view, however, in *Food Not Bombs,* but did not prevail. The *Food Not Bombs* majority did not acknowledge the substantial case law supporting my conclusion, and did not consider the likelihood that insurance premiums would, like the fees set in *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134 (1992), reflect the content of the permittee's expression and the likely reaction of bystanders to that content. Still, I am bound by *Food Not Bombs* as precedent, and so concur.

I note that the discussion in this opinion of the indemnification provision supports my view that setting an unrestricted insurance requirement as a condition for issuing a permit for expressive activity is unconstitutional. We explain today why the indemnity provision is not narrowly tailored. Insurance companies typically set premiums by first determining the risk of loss. Nothing in the Long Beach ordinance would prevent any issuer from taking into account, in assessing the risk of loss and then setting the premium for event insurance accordingly, the very considerations we conclude make the indemnity provision insufficiently narrowly tailored. Moreover,

an insurance requirement demands up front payment even if the insured risk never eventuates, making it even *less* narrowly tailored, and *more* likely to discourage communicative activities in public fora than an indemnity requirement.

I nonetheless concur, as I agree with Judges Fletcher and Pregerson that there is no difference of principle between the insurance requirement in this case and the one in *Food Not Bombs*.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LONG BEACH AREA PEACE NETWORK, and DIANA MANN, Plaintiffs, vs. CITY OF LONG BEACH, a municipal corporation, Defendant.	CASE NO. CV-04-08510 SJO (SSx) [PROPOSED] ORDER AND JUDGMENT RE PERMANENT INJUNCTION (Filed Jan. 11, 2005) Date: None Time: 10:00 a.m. Ctrm. 1600 Hon. S.James Otero

This action came before the Court, the Honorable S. James Otero presiding, on November 8, 2004 on Plaintiffs' motion for a preliminary injunction in the above-captioned action. The issues presented by Plaintiffs' motion were heard, and a decision granting

a preliminary injunction was issued by the Court on November 15, 2004. Prior to the hearing, all parties had the opportunity to brief fully, and to present any evidence deemed relevant to, the issues raised by Plaintiffs' facial challenge to the constitutionality of the Long Beach parade, assembly and "special event" permit scheme, codified as Long Beach Municipal Code §§5.60 *et seq.*

On December 20, 2004, the Court conducted the Case Scheduling Conference in this action. In view of the fact that this case was brought as a facial challenge to the constitutionality of a permit scheme, involving only questions of law to be decided by the Court, there is no discovery or additional evidence necessary to the consideration of the legal issues before the Court. Thus, there is no prejudice that will result to any party in this action by ordering that the hearing on the preliminary injunction be consolidated with the trial on the merits. *See Michenfelder v. Sumner*, 898 F.2d 328, 337 (9th Cir. 1988), *citing Rosenthal v. Carr*, 614 F.2d 1219, 1220 (9th Cir. 1980).

Accordingly, pursuant to Fed R. of Civ. P. 65(a)(2), the Court now orders that the hearing on the preliminary injunction be and is consolidated with the trial on the merits. Based on the evidence and argument submitted in support of and in opposition to the preliminary injunction, as well as the oral arguments presented at the hearing on the preliminary injunction, and for the reasons set forth in the Court's Order of November 15, 2004 and

incorporated as though fully set forth hereat [sic], granting Plaintiffs' motion for a preliminary injunction, the Court now enters a permanent injunction against Defendant.

There being no issues of fact to be tried and no further issues of law to be resolved by the Court, entry of final judgment at this time is appropriate. Therefore,

It is Ordered and Adjudged that:

Defendant City of Long Beach is ENJOINED from enforcing LBMC §§5.60 et seq.

DATED: 1-10-05 /s/ [Illegible]
UNITED STATES
DISTRICT JUDGE

Lodged by:

LAW OFFICE OF CAROL A. SOBEL
LAW OFFICE OF REBECCA F. THORNTON

/s/ Carol A. Sobel
By: CAROL A. SOBEL
Attorneys for Plaintiffs

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 429 Santa Monica Blvd., #550, Santa Monica, CA 90401.

On December 31, 2004, I served the foregoing document described as: [PROPOSED] ORDER AND

JUDGMENT in this action by placing a true copy thereof enclosed in a sealed envelope, and delivered to the person addressed as follows:

RANDALL C. FUDGE
Deputy City Attorney
333 West Ocean Boulevard, 11th Fl.
Long Beach, California 90802-4664

x **BY U.S. MAIL** I caused such envelope to be deposited in the mail, with postage thereon fully prepaid, at Santa Monica, California. [I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in the affidavit.]

__ **BY PERSONAL SERVICE** I personally delivered such envelope to the person shown above.

__ **BY OVERNIGHT DELIVERY** I caused such envelope to be deposited in a box or other facility regularly maintained by an overnight delivery express service carrier, or delivered this envelope to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees prepaid or provided for, addressed to the person on whom it is to be served, at the office address as last given by that person on

any document filed in the cause and served on the party making service.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed on December 31, 2004 at Santa Monica, California.

/s/ Carol A. Sobel
CAROL A. SOBEL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Long Beach Area Peace Network, *et al.*, Plaintiffs, v. City of Long Beach, Defendant.	NO. CV-04-8510 SJO (SSx) **ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** (Filed Nov. 15, 2004)

Plaintiffs Long Beach Area Peace Network (the "Peace Network"), and Diana Mann (collectively "Plaintiffs") filed a Complaint on October 14, 2004, challenging the constitutionality of Long Beach Municipal Code §§ 5.60 *et seq.* The matter now before the court is a Motion for Preliminary Injunction filed by Plaintiffs. The Motion came before the court for a regularly scheduled hearing on Monday, November 8, 2004. Having thoroughly considered all the pleadings, facts and arguments submitted by counsel for both parties, the court hereby issues its ruling. Plaintiffs' Motion is hereby GRANTED.

I. BACKGROUND

A. ORIGIN OF THE CONTROVERSY

Plaintiffs are challenging the City of Long Beach's parade, assembly and "special event" permit scheme codified as LBMC §§ 5.60 *et seq.* (Plaintiffs' Mem. of P. & A., hereinafter "P.&A.," at 1:2-4.) The

Peace Network is an unincorporated, loosely organized group of peace activists without an office, organizational phone, organizational email or insurance. (Ruyle Decl. ¶ 10.) On February 15, 2003, the Peace Network sponsored an anti-war rally. (*Id.* ¶ 4.) The February 15, 2003 rally included a march down public streets, along a path suggested by the City of Long Beach (the "City"). (*Id.*) City Council member Dan Baker and State Assembly member Alan Lowenthal participated in the rally. (*Id.*) The City waived all fees and costs for the February 15th rally. (*Id.*)

On or about March 20, 2003, the United States military launched "Operation Iraqi Freedom," and commenced an aerial assault on Baghdad. The Peace Network responded to this event by organizing another anti-war rally and scheduled it for March 22, 2003. The demonstration was put together to protest events in Iraq. The subject matter of the rally is important in only two respects. First, it is obviously political speech; and second, the Peace Network organized the rally to respond as quickly as possible to the onset of war. As with the previous rally, Peace Network member Eugene Ruyle submitted similar paperwork to the City requesting a permit for the rally, as well as a waiver of any fees for the event. (*Id.* ¶¶ 4 & 5; *see also id.*, Ex. 4, Request for Fee Waiver.) In a letter dated March 21, 2003, the City replied to the Peace Network's application. (*See* Ruyle Decl., Ex. 2.) In that letter, the City granted permission for the Peace Network to conduct a march on city streets and

hold a rally at Bixby Park. (*Id.*) The letter described the route for the march through the city streets and included a bill for services amounting to just over seven thousand dollars.[1] (*Id.*) The bill included a charge of $2,348 for police and $2,396 for "public works." (*Id.*) The letter stated "[p]ayment of fees will be in four equal installments of $1,760.24 to be paid in full within one year of the date of this letter." (*Id.*) The Peace Network decided to accept the conditions imposed by the City because the rally was scheduled for the next day. (Ruyle Decl. ¶ 5.) The person who signed the letter on behalf of the Peace Network noted that "the signers reserve the right to challenge the total, but they will pay first designated installment by [illegible] a.m. 3/22/04." (*Id.*; *see also* Ruyle Decl., Ex. 2.) The first installment was paid by personal check drawn on the account of Eugene Ruyle.[2] (Ruyle Decl., Ex. 7.) Plaintiff Mann was not present at the meeting at which the permit was signed, nor did she agree to the costs at any other time. (Mann Decl. ¶ 4.)

Approximately 1,000 people participated in a peaceful demonstration on March 22, 2003. (Ruyle Decl. ¶¶ 4 & 7.) The City commended the Peace

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[1] The record indicates the Peace Network and the City discussed alternate routes for the march with varying, but similar costs. (*See* Ruyle Decl., Ex. 5.)

[2] The City apparently lost the check and requested a replacement from Sharon Cotrell of the Peace Network. (Ruyle Decl. ¶ 5; and Ex. 6.)

Network for peaceful and orderly success of the rally. (*Id.*, Ex. 6.) As part of the event an organization calling itself the "Surfrider Foundation" placed surfboards on the sand in the shape of the peace symbol. (Mann Decl. ¶ 3.) The intention of the Surfrider Foundation was to have the symbol visible to any person looking down on the beach. (*Id.*) The display coincided with the march and rally organized by the Peace Network that was taking place at a nearby park. (*Id.*) The surfboard display was limited entirely to the beach and at no time did anyone block pedestrian or vehicular traffic on a street or sidewalk or otherwise interfere with ordinary traffic regulations. (*Id.*) The surfboards were removed at the end of the event and there was no damage to the beach. (*Id.*)

On February 20, 2004, the City sent a letter to Plaintiff Mann and other participants in the rally requesting payment of the fees for the event plus a $1,500 fee for the surfboard display on the beach. (Mann Decl. ¶ 5; Ruyle Decl., Ex. 9, Memo of Decision at 3:8-18.) The participants ignored the City's demand for payment. The City subsequently initiated a Small Claims action against the individuals named on the permit as well as Co-Plaintiff in the instant suit, Diana Mann. (*See generally* Ruyle Decl., Ex. 9, Memo of Decision.) The Small Claims Court held the $1,500 fine for the surfboard display was an unconstitutional restraint on freedom of expression. (Ruyle Decl., Ex. 9, Memo of Decision at 3:8-18.) The other individuals named in the Small Claims action lost their case and appealed to the county superior

court. (Ruyle Decl. ¶ 11.) Since March 22, 2003, the Peace Network has not held any marches or rallies because it fears it will face burdensome costs and extensive personal liability. (Ruyle Decl. ¶ 7.)

B. THE STATUTORY SCHEME

The LBMC requires applicants for an event permit to sign a "hold-harmless agreement" giving the City quite broad protection. Indeed, the entire statutory framework is quite broad as to what conduct is prohibited, the amount of discretion invested in the City official reviewing applications, and the burdens placed on applicants in terms of indemnification, insurance and costs that may be assessed by the City. For example, section 5.60.020 of the LBMC includes an expansive proscription on "special events":

> no person shall conduct or cause to be conducted, participate or engage in, hold, manage, permit or allow another to conduct a special event, in, on or upon any city street, sidewalk, alley, park, way, pier, public place, public property or public right-of-way which is owned or controlled by the city without first having obtained a written permit from the city manager.

LBMC § 5.60.020. The term "special event" is defined as follows:

> 1. Any organized formation, parade, procession, demonstration or assembly which

> may include persons, animals, vehicles, or any combination thereof, which is to assemble or travel in unison on any street, sidewalk or other public right-of-way owned or controlled by the city which does not comply with applicable traffic regulations, laws or controls; or
>
> 2. Any organized assemblage of seventy five (75) or more persons at any public place, property or facility which is to gather for a common purpose under the direction or control of a person; or
>
> 3. Any other organized activity involving seventy five (75) or more persons conducted by a person for a common or collective use, purpose or benefit which involves the use of, or has an impact on, public property or facilities and which may require the provision of city public services in response thereto.
>
> 4. Examples of special events include, but are not limited to, concerts, parades, circuses, fairs, festivals, block parties, street fairs, community events, on the water activities (such as boat races), mass participation sports (such as marathons and other running events), athletic or sporting events, and community celebrations and observances conducted on public property or public rights of way.

LBMC § 5.60.010(1). The Code defines an "event" as a "special event or a demonstration." LBMC

§ 5.60.010(F). The term "expressive activity" is defined by the LBMC as any "conduct, the sole or principal object of which is the expression, dissemination or communication by verbal, visual, literary or auditory means of opinion, views or ideas." LBMC § 5.60.010(D). The Code goes on to state "[e]xpressive activity includes, but is not limited to, public oratory and the distribution of literature." *Id.*

The Municipal Code invests virtually unrestricted discretion in "the city manager" to issue special permits pursuant to §§ 5.60.010 *et seq*. LBMC § 5.60.020(C). The LBMC states the "city manager may condition any permit issued pursuant to this chapter with reasonable requirements concerning the time, place, or manner of holding such even as is necessary to coordinate multiple uses of public property, assure preservation of public property and public places. . . . and to control vehicular and pedestrian traffic in and around the venue, provided that such requirements shall not be imposed in a manner that will unreasonably restrict expressive or other activity protected by the California or United States constitutions." LBMC § 5.60.020(D). The Municipal Code then goes on to delineate a non-exhaustive list of possible conditions. *Id.*

The Municipal Code is structured to contain exceptions to the special event permit requirement. LBMC § 5.60.030. For example, there is an exception for "[f]uneral processions by a licensed mortuary or funeral home." LBMC § 5.60.030(1). There is also an exception for "[s]pontaneous parades, assemblies or

demonstrations involving expressive activity and which are occasioned by news or affairs coming into public knowledge within five (5) days of such parade, assembly or demonstration, provided that the organizers thereof give written notice to the city manager at least twenty four (24) hours prior to such parade or assembly." LBMC § 5.60.030(5). Organizers of "spontaneous demonstrations" are required to give their name, address and telephone number to the city manager and, *inter alia*, estimate the approximate number of persons who will be participating; and the location and date of the proposed assembly. LBMC § 5.60.030(5)(a)-(g).

The provisions governing spontaneous demonstrations also provide "[t]he city manager may impose reasonable, time, place and manner restrictions on spontaneous parades, assemblies or demonstrations governed by this section whether or not said activities are governed by the permit requirements set forth in this chapter." LBMC § 5.60.030(B). Moreover, the "city manager may deny permission to conduct a spontaneous parade, assembly or demonstration if the city manager makes a finding requiring denial pursuant to section 5.60.070."

LBMC § 5.60.070 governs the denial of permits for spontaneous demonstrations and special events. It provides, *inter alia*, a permit may be denied if the "applicant fails to comply with all the terms of this chapter including failure to remit all fees and deposits, or provide proof of insurance and/or an indemnification agreement as required." LBMC

§ 5.60.070(A)(7). Finally, section 5.60.080 of the LBMC allows a city official to waive the insurance requirement, set the insurance requirement at any level or amount, and allows the City to require applicants to completely indemnify the City for any event that may occur, including actions by third parties, or even the actions of City officials themselves.

II. STANDARD

"No preliminary injunction shall be issued without notice to the adverse party." Fed. R. Civ. P. 65(a)(1). "A temporary restraining order may be granted without written or oral notice to the adverse party . . . only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required." Fed. R. Civ. P. 65(b). In the instant case, the Defendant City has adequate notice.

A party seeking preliminary injunctive relief must meet one of two tests: "either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions going to the merits were raised and the balance of hardships tips

sharply in its favor." *Immigrant Assistance Project of the Los Angeles County Federation of Labor v. Immigration and Naturalization Service*, 306 F.3d 842, 873 (9th Cir. 2002). The Ninth Circuit explained that "these two alternatives represent 'extremes of a single continuum,' rather than two separate tests." *Id.* (*citing Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999)). The greater the relative hardship to the moving party, the less it has to show the probability of success. *Id.* However, even if the balance of hardships tips decidedly in favor of a party moving for preliminary injunction, it must be shown as an irreducible minimum that there is a fair chance of success on the merits. *Id.*; *see also Stanley v. University of Southern California*, 13 F.3d 1313, 1319 (9th Cir. 1994) (*quoting Martin v. International Olympic Committee*, 740 F.2d 670, 674-75 (9th Cir. 1984). On the other end of the continuum, a preliminary injunction may also be granted even though the harm factor favors the defendant, provided that there is a strong likelihood of success on the merits. *Id.*; *see also Immigrant Assistance Project of the Los Angeles County Federation of Labor, supra*, 306 F.3d at 873.

There is also a distinction to be made between a mandatory preliminary injunction and a prohibitory preliminary injunction. *See Stanley, supra*, 13 F.3d at 1319-20. A prohibitory injunction preserves the status quo. *Id.* at 1320 (*citing Johnson v. Kay*, 860 F.2d 529, 541 (2d Cir. 1988)). Whereas, a mandatory injunction "goes well beyond simply maintaining the status quo

pendente lite [and] is particularly disfavored." *Id.* (*quoting Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979)). Accordingly, when the court is considering a request for mandatory preliminary relief that goes well beyond maintaining the status quo *pendente lite*, the Ninth Circuit instructs that "courts should be extremely cautious about issuing a preliminary injunction." *Martin, supra*, 740 F.2d at 675. In the instant case, Plaintiffs are challenging a municipal ordinance. Because the salient facts at issue are undisputed, and the court is dealing with a pure question of law. An expeditious resolution of the instant dispute through motion practice is particularly appropriate and highly desirable. Both parties have been given adequate time to brief the issue in depth. Accordingly, there is no reason why mandatory preliminary relief should not issue in the instant case if it is warranted.

III. DISCUSSION

Each party presented concise and well-argued pleadings, framing the following issues for the court: (1) whether the court should abstain from the instant suit based on the principles first articulated by the Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971); and (2) whether the LBMC ordinance is unconstitutional because it is (a) a content based restriction, (b) not narrowly tailored, or (c) an impermissible restriction on free speech and assembly due to the requirement for event organizers to indemnify

the City. (*Compare* P.&A. at 1-18; *and* Opp'n at 2-10.) The court will discuss these issues in turn.

A. YOUNGER ABSTENTION

The decision in *Younger* was based on considerations of federalism, equity and comity. *See Younger, supra*, 401 U.S. at 44 & 54. Essentially, the *Younger* doctrine instructs federal courts to avoid interfering with important state interests. *See id.* Because *Younger* itself was a § 1983 suit, the *Younger* Abstention doctrine plainly applies to cases brought under § 1983. At one time, abstention was only exercised under extraordinary and narrow circumstances. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). But the doctrine has been greatly expanded over the years. *See New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 367-68 (1989).

The holding in *Younger* itself directed federal courts to abstain from interfering with state criminal proceedings. *Younger*, 401 U.S. at 44. There are only a handful of exceptions to this rule, including an exception for prosecutions brought in bad faith. *See, e.g., Allee v. Medrano*, 416 U.S. 802, 838 (1974). For example, the doctrine does not apply to a state criminal proceeding brought solely for harassment and not conviction, as in *Dombrowski v. Pfister*, 380

U.S. 479 (1965). *Younger*, 401 U.S. at 48.[3] Another exception may exist for petitioners seeking an injunction in federal court against patently unconstitutional laws. *Younger*, 401 U.S. at 53-54; *contra Trainor v. Hernandez*, 431 U.S. 434, 463 (1977). A third exception to the *Younger* Abstention doctrine exists if there is no adequate state forum available, *Gibson v. Berryhill*, 422 U.S. 564 (1973). Finally, the parties may waive *Younger* Abstention by failing to timely object to federal jurisdiction. *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480 (1977).

The *Younger* Abstention doctrine now extends beyond the realm of criminal prosecutions to civil proceedings. In *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), the Supreme Court expanded the doctrine by holding a federal court should have abstained from interfering with a nuisance proceeding brought in state court against an adult movie theater. *Huffman, supra*, 420 U.S. at 604. The Court reasoned a nuisance proceeding was similar to a criminal prosecution. In *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) the Supreme Court extended the doctrine

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[3] In *Dombrowski*, plaintiffs alleged "the threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana." *Younger*, 401 U.S. at 44 (*quoting Dombrowski*, 380 U.S. at 482.)

to all civil proceedings to which a state is a party. The *Trainor* Court justified the decision on the grounds the state "was vindicat[ing] important state policies." *See also Moore v. Sims*, 442 U.S. 415, 423 (1979). In *Trainor*, the doctrine was applied to a civil fraud case brought by the state in a situation where the state could also have instituted criminal proceedings. *See Trainor, supra*, 431 U.S. at 444.

In *Juidice v. Vail*, 431 U.S. 327 (1977), the *Younger* doctrine was again extended to apply to civil proceedings where a state was not a party. *Juidice, supra*, 431 U.S. at 336 [doctrine applied to state court contempt proceedings]. The doctrine was once more employed in the civil context in *Pennzoil Co. v. Texaco Inc.*, 581 U.S. 1, 10 (1987), where *Younger* Abstention was applied to a case brought in federal court by a plaintiff contesting the requirement of posting bond in state court to appeal a large damage award.

In *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 432 (1982), the doctrine was expanded to apply to pending state administrative proceedings. In *Middlesex County*, a New Jersey attorney was facing a disciplinary proceeding before the state bar association. *Middlesex County, supra*, 457 U.S. at 427-28. The Supreme Court upheld the trial court's decision to dismiss the case in deference to pending state proceedings. *Id.* at 432. The Court held "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved. *Id.* (*citing Moore, supra*, 442 U.S. at 423;

and Huffman, 420 U.S. at 604-05.) "Where vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.'" *Id.* (*quoting Moore*, 442 U.S. at 426.) The Middlesex County Court laid out a three-part test to determine whether abstention is appropriate: *first*, is there an underling [sic] action that could constitute an "ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges." *Id.*; *see also Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 (1986) (*holding* the district court should have abstained from interfering with proceedings conducted by the Ohio Civil Rights Commission where allegations of discriminatory conduct were brought against a school.) As it must do, the court now turns to apply the three part test described in *Middlesex County* to facts in the instant case.

As a preliminary matter, the court is also guided by the admonition of Justice Scalia, writing for the Supreme Court in *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 367-68 (1989):

> Although our concern for comity and federalism has led us to expand the protection of *Younger* beyond state criminal prosecutions, to civil enforcement proceedings, . . . it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive

> action. *Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States.*

New Orleans Pub. Serv., supra, 491 U.S. at 367-68 (1989) (emphasis added). The Supreme Court has also commented "we do not remotely suggest 'that every pending proceeding between a state and a federal plaintiff justifies abstention unless one of the exceptions to *Younger* applies.'" *Moore v. Sims*, 442 U.S. 415, 423 n.8 (1979).

Turning to the first prong enunciated in *Middlesex County*, it is apparent there is an ongoing state proceeding. *See Middlesex County*, 457 U.S. at 432. Because Plaintiffs filed an appeal of the Small Claims decision, the parties are presently before a state trial court. (*See, e.g.*, Fudge Decl., Ex. A.) The second prong of the *Middlesex County* test probes whether the state proceedings implicate important state interests. *See Middlesex County*, 457 U.S. at 432. In the instant case, it would be hyperbole to say a Small Claims Court proceeding implicates "important state interests" as that term is used in the context of Supreme Court jurisprudence. If a Small Claims court proceeding necessitates abstention, then it would be difficult to imagine a proceeding in which any local government is involved where *Younger* Abstention would not apply. As already noted, such a broad abstention requirement would, as Justice Scalia put it, "make a mockery of the rule that only

exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Pub. Serv.*, 491 U.S. at 367-68.

Plaintiffs contend abstention would also be improper because the instant suit is brought to enjoin future conduct, inasmuch as it is a suit brought to contest the action taken by the City in Small Claims Court. (*See* Reply at 3:7-14.) In a case cited by Plaintiffs, *Agriesti v. MGM Grand Hotels, Inc.*, 53 F.3d 1000 (9th Cir. 1995), the plaintiff was arrested and charged with misdemeanor violations. *Agriesti, supra*, 53 F.3d at 1001. The court found there were no ongoing prosecutions against the plaintiff in *Agriesti*, and the plaintiff brought suit to enjoin future state action. *Id.* The Ninth Circuit overturned the trial court's decision to abstain from the case on the grounds there were (1) no ongoing state court proceedings; and (2) *Younger* Abstention is inappropriate when suit is brought to bar future prosecutions. *Id.* As in *Agriesti*, in the instant case, it would be inappropriate to deny Plaintiffs a chance to litigate their constitutional claims in federal court when they fear they will fall victim in the future to unconstitutional action taken by the City.

Finally, turning to the third prong of the *Middlesex County* test, Plaintiffs in the instant case – the Peace Network and Co-Plaintiff Diana Mann –

are not properly part of the state court action.[4] (Reply at 2-3.) There is no question Peace Network is not named in the underlying state court action. Some of its members may be implicated. However, as an organization, the Peace Network's interests are not necessarily represented in the state court action. There is some confusion as to whether Co-Plaintiff Mann is a party to the state court action. Her name is on the signature page promising to pay the City $7,041.00. (Ruyle Decl., Ex. 7.) However Ms. Mann swears she "did not sign any permits for the March 22, 2003 events and was not present when individuals from the [Peace Network] met with the City officials just prior to the event." (Mann Decl. ¶ 4.) It also appears Ms. Mann may have been voluntarily dismissed from the state court action by the City Attorney. (Mann Decl. ¶ 5.) Accordingly, *Younger* Abstention is inappropriate because Plaintiffs are not formally a part of the state court proceeding.

Finally, Plaintiff Mann is also seeking monetary damages in the instant case. It is not immediately

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[4] While that might normally lead the court to conclude these Plaintiffs do not have standing, there is an exception to the traditional justiciability requirements when a plaintiff is challenging a statute on the grounds it is allegedly over-broad. *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (1988) ("when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license.")

clear whether *Younger* applies to cases where the plaintiff is seeking monetary relief, as opposed to equitable or injunctive relief. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 202 (1988) (commenting "[w]e need not decide the extent to which the *Younger* doctrine applies to a federal action seeking monetary relief"). It appears this question has yet to be settled by the Ninth Circuit and is presently under review by the appellate court sitting *en banc*. *Am. Consumer Publ. Ass'n v. Margosian*, 349 F.3d 1122, 1129 (9th Cir. 2003), *vacated by, rehearing en banc, Am. Consumer Publ. Ass'n v. Margosian*, 366 F.3d 788 (9th Cir. 2004). Regardless, the court hereby finds *Younger* does not apply to the case at bar.

B. FIRST AMENDMENT

Public property is divided into three broad categories for First Amendment purposes. The first category comprises traditional public fora: places which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939). A traditional public forum has as "a principal purpose . . . the free exchange of ideas." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). Sidewalks, streets, and parks have been recognized as traditional public fora, which have by long tradition been devoted to assembly and debate. *ACORN*, 798 F.2d at 1264. The

government's ability to restrict speech in such places is severely limited. *See United States v. Grace*, 461 U.S. 171, 177 (1983).

The court need not address the other two categories inasmuch as they are irrelevant for the purposes of the instant motion.

1. PRIOR RESTRAINT

A municipal regulation or "law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969) (citing *Lovell v. Griffin*, 303 U.S. 444 (1938); *Hague v. C. I. O.*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147, 163-65 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); and *Largent v. Texas*, 318 U.S. 418 (1943)). The Supreme Court unambiguously described licensing schemes similar to the one at issue in the instant case as "prior restraints" on First Amendment rights. *Id.* The court wrote:

> It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the

> discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969) (*quoting Staub v. Baxley*, 355 U.S. 313, 322 (1958)). In addition, the Ninth Circuit also made it clear that a prior restraint on the exercise of First Amendment rights, such as the ordinance at issue here, requiring citizens to apply in advance for an "event licence," bears a heavy presumption against constitutional validity. *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994) (citing *Vance v. Universal Amusement Co., Inc.* 445 U.S. 308, 317 (1980)).

That being said, "[p]rior restraints are not unconstitutional *per se*." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). But any system of prior restraint comes "bearing a heavy presumption against its constitutional validity." *Id.* Reasonable time, place and manner restrictions may qualify as exceptions to the general prohibition against prior restraint of free speech. *United States v. Kistner*, 68 F.3d 218, 221 (8th Cir. 1995). "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock against Racism*, 491 U.S.

781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

2. TIME, PLACE AND MANNER RESTRICTION

In assessing the constitutionality of a regulation that limits the time, place or manner of speech in a public forum, a court must first determine whether the statute is content-neutral or content-based. *See Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1332 (9th Cir. 1987). If it is content-based, the court applies strict scrutiny to determine whether the statute is tailored to "serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (quotation omitted). However, if the statute is content-neutral, the government may enforce its rules provided that they (1) are narrowly tailored to serve a significant governmental interest, and (2) leave open ample alternative channels for communicating the information. *ACORN*, 798 F.2d at 1267.

(a) CONTENT BASED OR CONTENT NEUTRAL

"A time, place, or manner regulation is content neutral if the government can justify the restriction without reference to the content of the regulated activity." *United States v. Kistner*, 68 F.3d 218, 221 (8th Cir. 1995). "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether

the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward, supra*, 491 U.S. at 791 (1989). "The government's purpose is the controlling consideration." *Id.* "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Relying on *Ward*, the Eighth Circuit court of appeals added "[i]n addition to being facially neutral, a regulation must not place unbridled discretion in the hands of the government officials who enforce it." *Kistner*, 68 F.3d at 221.

Plaintiff argues the Long Beach Municipal Code is facially invalid, and content based, because it is overly-broad. (P.&A. at 10-13.) There seems to be confusion in case law as to whether the "over-breadth" doctrine is properly included in the discussion of whether a statute is content based, or content neutral. *Compare Kistner*, 68 F.3d at 221; and *United States v. Linick*, 195 F.3d 538, 542 (9th Cir. 1992); *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). The Ninth Circuit and the Supreme Court treat the over-breadth doctrine as a separate issue, and a fundamentally different sort of challenge to a statutory licensing scheme. *United States v. Linick*, 195 F.3d 538, 542 (9th Cir. 1992); *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

Both parties cite *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018 (C.D.

Cal. 2002), to support their respective arguments on the question of whether the LBMC is content based. The statutory scheme at issue in *Mardi Gras of San Luis Obispo* was found unconstitutional because it vested too much discretion in the hands of local officials and was therefore over-broad. *Mardi Gras of San Luis Obispo, supra*, 189 F. Supp. 2d at 1032. The question of whether a statute is over-broad, is closely related to the question of whether the statute is "narrowly drawn and represent[s] a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-612 (1973) (summarizing Supreme Court jurisprudence on the over-breadth doctrine). Accordingly, this court will address the over-breadth doctrine separately and prior to the analysis of whether the LBMC is narrowly tailored to meet a compelling government interest.[5] *See id.*

Plaintiff also argues the statutory scheme is formally content based. (P.&A. at pp. 9-11.) In order to eliminate any possible confusion, this court will first tackle the question of whether the Municipal Code is content based; before proceeding to the issue of over-breadth. Plaintiff maintains the instant statutory scheme is content based because the Municipal

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[5] In *Mardi Gras of San Luis Obispo*, the court found the San Luis Obispo Municipal Code was "content based"; and failed to pass the test for "the least restrictive means to further a compelling interest." 189 F. Supp. 2d at 1032.

Code purports to regulate "parades and special events," core First Amendment activity, while LBMC 5.60 contains a second set of terms for a narrow subset of associational and expressive activity that is to be deemed "expressive" and "protected by the Constitution" at the discretion of the City.[6] (P.&A. at 10:3-7.) It would appear Plaintiffs are referring to LBMC § 5.60.010(1) and LBMC § 5.60.020(D) in making this argument.

Once again, the LBMC includes the following provisions. LBMC § 5.60.010 defines a "special event" as follows:

> 1. Any organized formation, parade, procession, demonstration or assembly which may include persons, animals, vehicles, or any combination thereof, which is to assemble or travel in unison on any street, sidewalk or other public right-of-way owned or controlled by the city which does not comply with applicable traffic regulations, laws or controls; or
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> 2. Any organized assemblage of seventy five (75) or more persons at any public place,

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[6] Plaintiff also argues the same code section is "content based" because the terms "common purpose" and "organized" are not adequately defined, so that "police officers on the street are free to conclude that 75 people [assembled for the purpose of viewing an] appearance of President Bush in the City are "organized" and there for a "common purpose." (P.&A. at 10:8-12.) This argument is best addressed under the rubric of the over-breadth doctrine, *infra*.

> property or facility which is to gather for a common purpose under the direction or control of a person; or
>
> 3. Any other organized activity involving seventy five (75) or more persons conducted by a person for a common or collective use, purpose or benefit which involves the use of, or has an impact on, public property or facilities and which may require the provision of city public services in response thereto.
>
> 4. Examples of special events include, but are not limited to, concerts, parades, circuses, fairs, festivals, block parties, street fairs, community events, on the water activities (such as boat races), mass participation sports (such as marathons and other running events), athletic or sporting events, and community celebrations and observances conducted on public property or public rights of way.

LBMC § 5.60.010(1). Whereas LBMC 5.60.020(D) provides:

> The city manager may condition any permit issued pursuant to this chapter with reasonable requirements concerning the time, place, or manner of holding such even as is necessary to coordinate multiple uses of public property, assure preservation of public property and public places. . . . and to control vehicular and pedestrian traffic in and around the venue, provided that such requirements shall not be imposed in a

> manner that will unreasonably restrict expressive or other activity protected by the California or United States constitutions.

LBMC § 5.60.020(D).

In *Colacurcio v. City of Kent*, 163 F.3d 545, 551 (9th Cir.1998) (citing *Tollis*, 827 F.2d at 1332), the Ninth Circuit stated "[i]n determining whether an ordinance is content-neutral, our principal inquiry is 'whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'" *Colacurcio, supra*, 163 F.3d at 551 (quoting *Ward*, 491 U.S. at 791). Moreover, "[t]he content-neutrality requirement is met if the involved ordinance is 'aimed to control secondary effects resulting from the protected expression,' rather than at inhibiting the protected expression itself.'" *Id.* (citations omitted.) Finally, the *Colacurcio* court observed:

> If the ordinance is predominantly aimed at the suppression of First Amendment rights, then it is content-based and presumptively violates the First Amendment. If, on the other hand, the predominant purpose of the ordinance is the amelioration of secondary effects, then the ordinance is content-neutral and the court must then determine whether the ordinance passes constitutional muster as a content-neutral time, place, and manner regulation.

Id. at 551 (citing *Tollis*, 827 F.2d at 1332).

In the instant case, there is no language on the face of the statute showing the City is targeting a certain type of speech. Indeed, the ordinance is so broad, it seems to encompass and regulate nearly every type of gathering imaginable, from block parties to any "community celebration" or "observance" conducted on public property. *See* LBMC § 5.60.010. The City is not targeting a particular type of expression. But the key question is whether the LBMC is "aimed at the suppression of first amendment rights"; or meant to inhibit protected expression itself. *Colacurcio, supra*, 163 F.3d at 551 Rather, the City is regulating all types of expression and assembly. While the LBMC evidences a desire to manage crowds, traffic and the attendant circumstances of large public gatherings (*i.e.*, trash collection), the primary goal of the relevant code section is to regulate all expressive activity and gatherings. *See generally* LBMC § 5.60.010. Accordingly, it appears the LBMC is "content-based" as that term is defined by the Ninth Circuit in *Colacurcio* because the Municipal Code is principally concerned with regulating public expression and assembly – two fundamental rights protected under the First Amendment. *See Colacurcio*, 163 F.3d at 551. However, the question of whether the LBMC is unconstitutional is best analyzed under the over-breadth doctrine.

(b) THE LBMC IS OVERLY BROAD

In *United States v. Linick*, 195 F.3d 538, 542 (9th Cir. 1999), the Ninth Circuit invalidated a federal

park regulation on the grounds it vested unbridled discretion with the Forest Service to deny expressive activity and was therefore overbroad on its face. In *Ward*, 491 U.S. at 794, on the other hand, the Supreme Court upheld a municipal guideline that required band-shell performers in New York City's Central Park to use sound-amplification equipment and sound technicians provided by the city. "To the extent that the city had discretion in *Ward*, such discretion took the limited form of the city sound technician's ability to vary sound quality and sound volume to avoid excessive noise." *Linick*, 195 F.3d at 542 (describing *Ward*, 491 U.S. at 794-95). However, the Ninth Circuit in *Linick* found that a statutory guideline akin to the one at issue in the instant case was invalid because, *inter alia*, a government official could use the statute "to attach conditions to the use of a public forum in advance of actual expression." *See id.* The portion of the LBMC at issue in the instant case is more akin to the statutory framework in *Linick*, than the rules described by the Court in *Ward*.

The overbreadth doctrine prevents the government from vesting unbridled discretion in the hands of government officials. *Id.* Plaintiffs challenging a statute on the grounds of alleged over-breadth automatically satisfy the requirements for standing. *Id.* "[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v.*

Plain Dealer Pub. Co., 486 U.S. 750, 757 (1988). "In the prior restraint context, the Supreme Court has recognized that 'the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint,' can threaten First Amendment values even if such discretion and power are never actually abused." *Linick*, 195 F.3d at 542 (citations omitted). Such a statutory scheme threatens First Amendment values because it encourages people to exercise self-censorship rather than free expression. *Id.* Simply put, it is not acceptable that citizens are discouraged from expressing themselves out of fear of excessive cost, restrictions, liability or due to other roadblocks to free expression. *See id.*

In *Lakewood*, the statute in question addressed the placement of news racks on public property. The ordinance allowed the city to attach to the permit any "terms and conditions deemed necessary and reasonable." *Lakewood, supra*, 486 U.S. at 754. The Supreme Court found the ordinance unconstitutional because the city was vested with an impermissible degree of discretion to deny expressive activity. *See id.* at 769.

Relying on the Supreme Court's holding in *Lakewood*, the Ninth Circuit found a federal regulation to be unconstitutionally overbroad in *Linick*, 195 F.3d at 542. In *Linick*, the regulation in question authorized Forest Service officers with an impermissible level of discretion because it allowed an officer to attach "terms and conditions" to a permit. *Id.* Specifically, the federal regulation at issue in

Linick "state[d] that a special use permit may contain such "terms and conditions as the authorized officer deems necessary to . . . otherwise protect the public interest." *Id.* (quoting 36 C.F.R. § 251.56(a)(2)(vii)). The Ninth Circuit found such broad language "can be abused in a manner that could limit the use of public land by parties who hold political views that are disfavored by the Forest Service." *Id.*

In the instant case, Plaintiffs contend the statutory scheme at issue is overly broad for several reasons. First Plaintiffs argue it confers unbridled discretion in the hands of government officials reviewing applications for special event permits. (P.&A. at pp. 10-11.) More specifically, Plaintiffs contend subsection "B" of LBMC § 5.60.080 authorizes City officials to set the amount of liability insurance required for an event without reference to any objective standards. (*Id.*) Plaintiff also argues the same code section is "content based" because the terms "common purpose" and "organized" are not adequately defined, so that "police officers on the street are free to conclude that 75 people [assembled for the purpose of viewing an] appearance of President Bush in the City are "organized" and there for a "common purpose." (P.&A. at 10:8-12.) To support their argument, Plaintiffs rely on *Mardi Gras of San Luis Obispo, supra*, 189 F. Supp. 2d 1018.

Defendant attempts to distinguish *Mardi Gras of San Luis Obispo*, on the grounds that the San Luis Obispo Municipal Code allegedly made a distinction between different types of speech. In reality, *Mardi*

Gras of San Luis Obispo, is very close to the point. As in the instant case, the San Luis Obispo Municipal Code included a clause providing that city officials attach conditions "in a careful and consistent manner and that events which enjoy First Amendment protection under the United States Constitution are lawfully regulated. . . . the city must assure that the community does not assume a disproportionate share of the costs of parades and special events." *Mardi Gras of San Luis Obispo*, 189 F. Supp. 2d at 1031 n. 13. The San Luis Obispo Municipal Code also contained a provision requiring insurance or indemnification from applicants requesting an event permit.[7] *Id.* The court held "Defendant has not shown

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[7] Specifically, the San Luis Obispo Municipal Code contained the following provisions:

> the permitee shall procure and maintain full force and effect during the term of the permit a policy of insurance covering general liability and property damage in an amount to be determined by the risk manager, which policy includes the city, its boards, officers, agents and employees as named insureds . . .

Mardi Gras of San Luis Obispo, 189 F. Supp. at 1029 (quoting SLOMC § 5.76.090(B)). The section further provides that "nothing in this section shall be construed to apply to parades or local special events . . . which enjoy First Amendment protection." SLOMC § 5.76.090(C). *Id.* For events protected by the First Amendment, the applicant in *Mardi Gras of San Luis Obispo* "was given the choice of either providing insurance coverage, agreeing to indemnify the City for damages arising out of the sponsor's own acts or omissions or agreeing to redesign the event to respond to dangers to the public health and safety identified by the city administrative officer." *Id.* While the San Luis Obispo Municipal Code attempted to distinguish between

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that the liability insurance requirement or the departmental service charge requirement are the least restrictive means to further the governmental interests advanced by Defendant." *Id.* at 1032.

Moreover, the Supreme Court in *Lakewood* provided an additional rational [sic] for invalidating a similar regulatory framework as the one at issue in the case at bar:

> the absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

Lakewood, 486 U.S. at 758.[8]

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two different types of speech or conduct, the provisions described in *Mardi Gras of San Luis Obispo* are not materially different from the relevant provisions of the LBMC at issue in the instant case.

[8] In *Lakewood*, the Court invalidated an ordinance governing the licensing of news stands on the grounds, *inter alia*, it could allow the Mayor to attach conditions to the placement or

(Continued on following page)

In the instant case, LBMC § 5.60.020 authorizes City officials to attach any condition on a use permit provided the conditions are not attached "in a manner that will unreasonably restrict expressive or other activity protected by the California or United States Constitutions." LBMC § 5.60.020(D). As in *Mardi Gras of San Luis Obispo*, the clause imploring City officials to obey the constitution is not enough to save the statute. *See Mardi Gras of San Luis Obispo*, 189 F. Supp. 2d at 1031 n. 13. In the instant case, the LBMC includes a non-exhaustive list of conditions that may be attached, including the inspection and approval by City officials of all structures and items to be displayed at the event. *See* LBMC § 5.60.020(D). This kind of regulation easily lends itself to abuse. Furthermore, there is no express limit on what conditions the City may apply. *Id.*

Furthermore, LBMC § 5.60.070 permits a City official to deny an application if the "applicant fails to comply with all terms of this chapter including failure to remit all fees and deposits, or fails to provide proof of insurance and/or an indemnification agreement as required by this chapter." LBMC § 5.60.070(7). Part of the problem with this provision is there is no limit to the amount an official may charge in terms of a fee, or require in terms of insurance or indemnification. *See* LBMC §§ 5.60.080 & 5.60.090. There is clear evidence

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location of the newsstands; or facilitate *post hoc* rationalization of decision made essentially on basis of what was being sold at the newsstands. *Lakewood*, 486 U.S. at 758-59.

this provision has been abused in the instant case, For example, a "fee" or fine was assessed in the amount of $1,500 against a group of individuals who did nothing more than place their surfboards in the sand. Moreover, section 5.60.070 has already been struck down in the past by a California Appellate court. *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 14 Cal. App. 4th 312, 342 (1993). "Courts that have reviewed parade insurance requirements have uniformly found them to overreach, in view of the overlapping utility and availability of other means of protection as referred to above, and the concomitant absence of a history of claims and hence need for expensive, high-limit coverage." *Id.* In *Long Beach Lesbian & Gay Pride, supra*, 14 Cal. App. 4th at 342, the court held "where the cost of the insurance has closely threatened (until preliminarily enjoined) to prevent plaintiffs' protected activity yet that coverage has never had to be called upon, section 5.60.070(B)'s insurance requirement appears to be a relatively gratuitous burden, 'substantially broader than necessary to achieve the government's interest.'" *Id.* (citing *Ward v. Rock Against Racism, supra*, 491 U.S. at p. 800).

The LBMC provisions authorizing City officials to calculate and assess an indeterminate fee for the use and expense of City property and, *inter alia*, police or security costs, is factually similar to the statute described in *Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 134 (1992). In *Forsyth*, the county was assessed fees on the basis of

the number of police that would be required; and measured the number of police that would be required for a given event by gauging the relative hostility or explosiveness of the message to be conveyed at the gathering. *Id.*[9] In the instant case, the City officials are able to provide virtually any justification for the fee to be assessed. Accordingly, the statute at issue in the instant case is actually more broad than the statute struck by the Supreme Court in *Forsyth*. *See id.*

Defendant retorts the LBMC provides adequate limits on the discretion of City officials in calculating the fee to be charged to applicants. The Defendant City also notes that according to LBMC § 5.60.10(C) it is impermissible to assess any costs incurred by the City to provide police protection. (Opp'n at 6-7.) In view of the facts on record in the instant case, this argument is overly nuanced. As a point of fact, Plaintiffs were assessed $2,348.00 in charges related to police services for "traffic and pedestrian control," on March 22, 2003; but assessed nothing on February 17, 2003 for a nearly identical event. (Ruyle Decl., Exs. 2 & 5.) It would be easy for an official, in a *post hoc* fashion, to characterize any police involvement in an event as "pedestrian or traffic control." At the very least, City officials are applying code provisions in an

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[9] The LBMC requires that in "determining whether to approve a permit application for an event involving expressive activity, no consideration may be given to the message of the event, the content of the speech. . . ." LBMC § 5.60.040(K).

arbitrary and capricious manner. The City approved the request for a waiver of insurance, but the individuals organizing the rally were required to sign a note indemnifying the City for any damages incurred during the rally. (*See id.*) As a matter of law, the discretion invested in City officials affording them the ability to waive or impose an insurance requirement lends itself to abuse. *See Mardi Gras of San Luis Obispo*, 189 F. Supp. 2d at 1030. "The fact that the City can determine the amount of insurance required indicates that the official may look to the content of the speech, including an element of anticipated hostility to make his or her determination." *Id.* In the instant case, as in *Mardi Gras of San Luis Obispo*, the city manager is invested with unbridled discretion to impose any insurance requirement on applicants. LBMC § 5.60.080(B). Moreover, the indemnification clause is so broad it requires an applicant to indemnify the City for actions taken by third parties, and to defend the City against any claim filed versus the City, its officers, agents or employees. LBMC § 5.60.080. Presumably, that could put the Peace Network in the position of paying to defend a lawsuit brought against City officials by some of its own members for, *inter alia*, unlawful detention or some other cause of action that routinely arises during a political rally. This clause violates the First Amendment because it discourages applicants from organizing events by imposing the fear of onerous liability. *See Linick*, 195 F.3d at 542. As a result, applicants may be prone to self-censorship. *See id.*

C. NOT NARROWLY TAILORED

The sole government interest identified by the Defendant City is the "government interest in regulating its parks, streets and other public areas." (Opp'n at 7:12-13.) The Defendant cites *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) for the principle that "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." (Opp'n. at 7:16-18.) One problem with Defendant's argument is that the only "evil" identified, or sought to be remedied by LBMC is "expressive activity" or the assembly of 75 or more people. For the reasons described above, as in *Mardi Gras of San Luis Obispo*, the requirements of insurance and indemnification in the LBMC cannot not be characterized as "narrowly tailored" to address the government interest. *See id.*

The LBMC does not provide standards or guideposts that would allow the court to determine whether the City is assessing fees and conditions in an objective manner, or discriminating against disfavored speech. "Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *Lakewood*, 486 U.S. at 758. In the instant case, the Peace Network organized a rally on similar subject matter on two occasions, separated by roughly one month in time. However, the City inexplicably

assessed widely divergent fees and costs on the participants of each rally. This point alone lends itself to a finding that the City is engaged in *post hoc* rationalization of its licensing decisions. *See id.*

D. ALTERNATE CHANNELS FOR COMMUNICATION

Because the court already determined the LBMC is an unconstitutionally overbroard prior restraint on free speech and assembly, it not necessary to address this issue. *See, e.g., Mardi Gras of San Luis Obispo*, 189 F. Supp. at 1035. In passing, however, the court makes the following observations. It is well-established that "the burden of proving alternative avenues of communication rests on" the government. *Seung Chun Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000). Here, the City must make a reasonable and good faith showing that its proffered alternative avenues of communication provide a reasonable opportunity for Plaintiffs to convey their messages within the City. *See id.* Implicit in this court's discussion, *supra*, is the conclusion that the LBMC encompasses nearly every form of expression, and thereby leaves the First Amendment rights of the citizens of Long Beach vulnerable to the caprice of City administrators. It cannot be said that a reasonable alternative avenue of expression exists in the City of Long Beach when peaceful protestors are fined for marking images in the sand.

E. IRREPARABLE HARM

"'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998). Because Plaintiffs have demonstrated probable success on the merits of its claim that the LBMC is overbroad, the court finds that Plaintiffs would suffer irreparable injury as a result of the threatened and continued enforcement of the Ordinance *pendente lite*.

IV. RULING

For all the reasons stated above, Plaintiffs have shown a likelihood to succeed on the merits. Plaintiffs' Motion for a Preliminary Injunction is hereby GRANTED. Defendant City of Long Beach is enjoined from enforcing Long Beach Municipal Code Chapter 5.60. Plaintiff is excused from posting bond under Fed. R. Civ. P. 65(c) under the authority of *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999).

Dated this 15 day of November, 2004.

/s/ S. James Otero
S. JAMES OTERO
UNITED STATES
DISTRICT JUDGE

Chapter 5.60 PARADES AND SPECIAL EVENTS

Sections:

5.60.010 Definitions.

5.60.020 Permit Required.

5.60.030 Exceptions to the special event permit requirement.

5.60.040 Permit – Application.

5.60.050 Permit application – Fee.

5.60.060 Permit – Term.

5.60.070 Permit – Denial or revocation.

5.60.080 Insurance.

5.60.090 Departmental services charge.

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5.60.010 Definitions.

A. "City manager" means the City Manager of the City of Long Beach and his/her designee.

B. "Demonstration" means any formation, procession or assembly of persons for the purpose of expressive activity, who intend to or do assemble or travel in unison on any street, sidewalk or other public right-of-way owned or controlled by the city in a manner that does not comply with normal or usual traffic regulations, laws or controls.

C. "Departmental services charges" means the actual costs which a department of the city incurs in connection with activities for which a permit is required under this chapter, including, but not limited to, costs associated with fire safety, traffic and/or pedestrian control, water safety, the closure of streets or intersections, the diverting of traffic, the salaries of city personnel involved in administration or coordination of city services for the event, the cost to the city to provide support personnel, equipment, materials and supplies, and related city costs such as fringe benefits or employee overtime. Departmental services charges shall not include costs incurred by the city to provide police protection to those engaged in "expressive activity" as that term is defined in this chapter.

D. "Expressive activity" means conduct, the sole or principal object of which is the expression, dissemination or communication by verbal, visual, literary or auditory means of opinion, views or ideas. Expressive activity includes, but is not limited to, public oratory and the distribution of literature.

E. "Event organizer" means any person who conducts, manages, promotes, organizes, aids or solicits attendance at a special event.

F. "Event" includes a special event or a demonstration.

G. "Person", as used in this chapter, means any natural person, firm, association, joint venture, joint stock company, partnership, organization, club, company, corporation, business trust or manager, lessee, agent, servant, officer or employee or any of them, except where the context clearly requires a different meaning.

H. "Sidewalk" means that portion of a highway, other than the roadway, set apart by curbs, barriers, markings, or other delineation for pedestrian travel.

I. "Special event" means:

1. Any organized formation, parade, procession, demonstration or assembly which may include persons, animals, vehicles, or any combination thereof, which is to assemble or travel in unison on any street, sidewalk or other public right-of-way owned or controlled by the city which does not comply with applicable traffic regulations, laws or controls; or

2. Any organized assemblage of seventy five (75) or more persons at any public place, property or facility which is to gather for a common purpose under the direction or control of a person; or

3. Any other organized activity involving seventy five (75) or more persons conducted by a person for a common or collective use, purpose or benefit which involves the use of, or has an impact on, public property or facilities and which may require the provision of city public services in response thereto.

4. Examples of special events include, but are not limited to, concerts, parades, circuses, fairs, festivals, block parties, street fairs, community events, on the water activities (such as boat races), mass participation sports (such as marathons and other running events), athletic or sporting events, and community celebrations and observances conducted on public property or public rights of way.

J. "Special Event Permit" means a permit issued pursuant to this chapter.

K. "Special Event Venue" means that area for which a special event permit has been issued.

L. "Street" means a way or place of whatever nature, publicly maintained and open to use of the public for purposes of vehicular travel. Street includes highways or alleys.

(Ord. C-7791 § 1, 2002).

5.60.020 Permit – Required.

A. Except as provided in chapter 2.54 or otherwise by this code or pursuant to the terms of a permit, lease or contract which has been specifically authorized by the city council, no person shall conduct or cause to be conducted, participate or engage in, hold, manage, permit or allow another to conduct a special event, in, on or upon any city street, sidewalk, alley, park, way, pier, public place, public property or public right-of-way which is owned or controlled by the city without first having obtained a written permit from the city manager.

B. The city manager may also approve and permit the sale or use of alcoholic beverages in public areas in connection with a special event where it is not expressly prohibited by this code provided that such sale or use shall, at all times, comply with all other applicable provisions of law. Any denial by the city manager of approval for a permit to sell or use alcoholic beverages under this subsection may be appealed as provided in section 5.60.130.

C. The city manager is authorized to issue permits for special events pursuant to the procedures established in this chapter.

D. The city manager may condition any permit issued pursuant to this chapter with reasonable requirements concerning the time, place or manner of holding such event as is necessary to coordinate multiple uses of public property, assure preservation of public property and public

places, prevent dangerous, unlawful or impermissible uses, protect the safety of persons and property and to control vehicular and pedestrian traffic in and around the venue, provided that such requirements shall not be imposed in a manner that will unreasonably restrict expressive or other activity protected by the California or United States constitutions. Conditions may include, but are not limited to, the following:

1. The establishment of an assembly or disbanding area for a parade or like event;

2. The accommodation of an event's pedestrian and vehicular traffic, including restricting events to city sidewalks, portions of a city street, or other public right-of-way;

3. Conditions designed to avoid or lessen interference with public safety functions and/or emergency service access;

4. The number and type of vehicles, animals, or structures to be displayed or used in the event;

5. The inspection and approval by city personnel of stages, booths, floats, structures, vehicles or equipment to be used or operated in the event to ensure that such structures or vehicles are safely constructed and can be safely operated, and conform to the requirements of all applicable codes;

6. A cleaning deposit if the event includes using structures, displaying or using horses or other large animals, operation of water

stations, food distribution or sales, beverage distribution or sales, and/or sale of other goods or services;

7. The provision and use of traffic cones or barricades;

8. The provision or operation of first aid stations or sanitary facilities, including handicap accessible sanitary facilities;

9. The provision of a waste management plan, and the clean up and restoration of the site of the event;

10. The use of sound amplification equipment, and restrictions on the amount of noise generated by motors and other equipment used in the course of the event;

11. The manner of providing notice of permit conditions to permit participants and those businesses or residents who may be directly affected by the conduct of the event;

12. The provision or use of emergency services;

13. The reasonable designation of alternate sites, times, dates, or modes for exercising expressive activity;

14. The obtaining of any and all business licenses or other necessary permits required by this code for the sale of food, beverage or other goods or services at the event; and

15. The manner by which alcohol sales and service, if any, shall be conducted at the event.

E. Issuance of a special events permit pursuant to this chapter does not obligate or require the city to provide city services, equipment or personnel in support of an event although the city manager may provide such services, equipment or personnel if such are reasonably available and the event organizer makes provisions to reimburse the city for the cost thereof.

(Ord. C-7791 § 1, 2002).

5.60.030 Exceptions to the special event permit requirement.

A. The following activities are exempt from the special event permit requirement:

1. Funeral processions by a licensed mortuary or funeral home;

2. Activities conducted by a governmental agency acting within the scope of its authority;

3. With the exception of organized fund raisers, events which take place on streets, sidewalks, or other public rights-of-way owned or controlled by the city including, but not limited to, lawful picketing wherein applicable traffic regulations, laws or controls are complied with;

4. Filming activities governed by chapter 5.61 of this code;

5. Spontaneous parades, assemblies or demonstrations involving expressive activity and which are occasioned by news or affairs coming into public knowledge within five (5) days of such parade, assembly or demonstration, provided that the organizers thereof give written notice to the city manager at least twenty four (24) hours prior to such parade or assembly. Such written notice shall contain all of the following information:

a. The name, address and telephone number of the person or persons seeking to conduct the parade or assembly. This person or these persons shall be considered a permittee for the purposes of this section;

b. The name, address and telephone number of the headquarters of the organization, if any, and of the organizer or responsible head of such organization by whom or on whose behalf the parade or assembly is proposed to be conducted;

c. The name, address and telephone number of the person who will chair the parade or assembly and who will be responsible for its conduct;

d. The location and date of the proposed parade or assembly, including the assembly area, disbanding area, and the route to be traveled;

e. An estimate of the approximate number of persons who will be participating in the parade or assembly and an estimate of the approximate number of persons who will be observing the parade or assembly;

f. The time at which the parade or assembly will start and conclude;

g. The type of security or other arrangements that will be provided to assure that participants are properly directed.

B. The city manager may impose reasonable time, place and manner restrictions on spontaneous parades, assemblies or demonstrations governed by this section whether or not said activities are governed by the permit requirements set forth in this chapter.

C. The city manager may deny permission to conduct a spontaneous parade, assembly or demonstration if the city manager makes a finding requiring denial pursuant to section 5.60.070. Such finding by the city manager shall be made no later than six (6) hours before the scheduled start time for the event. If the city manager makes a finding pursuant to section 5.60.070, the city manager shall immediately provide notice of the denial, including the reason or reasons for the denial, by telephone to the permittee and shall also provide written notice of the denial including the reason for the denial. If the permittee provides a fax number for the purpose of receiving notices, the city manager

shall provide written notice of the denial by fax immediately upon making the denial decision. In lieu of denial, the city manager may propose to the applicant an alternative time, route, venue or manner of conducting the activity which alternative would be acceptable to the city and which would obviate any finding made pursuant to section 5.60.070.

(Ord. C-7791, § 1, 2002).

5.60.040 Permit – Application.

A. The application for a permit under this chapter to conduct or engage in any special event except for any special event controlled by the recreation commission under chapter 2.54 of this code, which involves the use of city streets, alleys, sidewalks, parks, piers, ways, public property or public right-of-way owned or controlled by the city shall be filed with the city manager.

B. Applications shall be filed not less than sixty (60) calendar days, nor more than one year before the time it is proposed to conduct the special event except that applications for block party permits shall be filed at least ten (10) working days prior to the event, and except that applications for expressive activities shall be filed in accordance with subsection D of this section.

C. Except as otherwise applicable, the city manager shall, within ten (10) business days, determine whether such application is or is

not complete. In the case of an event involving expressive activity, the city manager shall determine whether or not such application is complete within twenty four (24) hours of said application being submitted to the city manager. Notwithstanding the city manager's acceptance of a completed application, no event date shall be considered confirmed until a special event permit is issued.

D. Unless otherwise specified in this chapter, an application for a special event by a person engaging in expressive activity for which a permit is required pursuant to this chapter shall be filed as follows:

TABLE INSET:

Permitted Activity Involves Use Of	Must Be Filed Within Specified Number Of Working Days Of Prior To The Event
Streets, highways and thoroughfares	10
Alleys and other rights-of way other than sidewalks	5
Sidewalks	3
Parks	3
Waterways and piers	3
Other	3

E. Applications for special events involving expressive activity or block parties, for which a permit is required pursuant to this chapter, may be filed in advance of the time periods set forth above but in no event more than one year prior to the event date. If an applicant for an event involving an expressive activity or block party desires to ensure the opportunity for an appeal to the city council in accordance with subsection 5.60.130.A, the application shall be filed with the city manager not less than thirty (30) calendar days, nor more than one year before the time when it is proposed to conduct the event. Failure to file the application at least thirty (30) days prior to the proposed activity shall be deemed to be a waiver of an appeal to the city council and in that event the decision of the city manager shall be final and the event organizer or other aggrieved person may file or cause to be filed a petition for writ of mandate in state court regarding the validity of the city manager's decision to grant or deny the application.

F. Each application shall be accompanied by a nonrefundable permit application fee in an amount established from time to time by resolution of the city council. The city manager shall have the authority, if good cause is shown and the nature of the application reasonably and feasibly lends itself to expedited processing, to consider, grant or deny any application for a permit which is filed later than the time prescribed in this section.

G. Completed applications for a permit authorizing a special event shall be denied, approved,

or conditionally approved by the city manager within thirty (30) days after the city manager determines that the application is complete. Completed applications for a permit involving "expressive activity" as defined in this chapter shall be denied, approved, or conditionally approved by the city manager within two (2) business days after the city manager determines that the application is complete. In the case of expressive activity, the city manager shall promptly attempt to notify the applicant orally, and provide written notification to the applicant as soon as it is reasonably practical to do so. Such notice shall provide detailed facts and reasons for any denial or conditional approval. The city manager shall consult with the city attorney before denying or conditionally approving a permit involving "expressive activity" (including all activities wherein the applicant claims or contends that the proposed event involves expressive activity) as that term is defined in this chapter.

H. Applications shall be upon a form which is furnished by or acceptable to the city manager. Each application shall contain full, complete and detailed information including, but not limited to, the following:

1. The name, address and telephone number of the event organizer;

2. A certification that the event organizer shall be financially responsible for any city fees, departmental services

charges or costs that may lawfully be imposed for the event;

3. The name, address and telephone number of the event organizer, if any, and the chief officer of the event organizer;

4. If the special event is designed to be held by, on behalf of, or for any organization other than the event organizer, the event organizer for the special event permit shall file a written communication from such organization:

a. Authorizing the event organizer to apply for the special event permit on its behalf;

b. Certifying that the event organizer and its principal shall be financially responsible for any city fees, departmental services charges or costs that may lawfully be imposed for the event;

5. A copy of the tax exemption letter issued for any applicant claiming to be a tax exempt nonprofit organization;

6. A statement of the purpose of the special event;

7. A statement of any fees to be charged to participants or spectators in connection with the special event;

8. The proposed location of the special event including a plot plan depicting the

placement of temporary structures or facilities on public property or public rights-of-way;

9. The date and times when the special event is to be conducted;

10. The approximate times when assembly for, and disbanding of, the special event is to take place;

11. The proposed locations of the assembly or production area;

12. In the case of a parade, marathon or other similar event, the specific proposed site or route, including a map and written narrative of the route;

13. The proposed site for any disbanding area;

14. Proposed alternate routes, sites or times, where applicable;

15. The approximate number of persons, animals or vehicles that will participate in the special event;

16. The kinds of animals anticipated to be part of the special event;

17. A description of the types of vehicles to be used in the special event;

18. The number of bands or other musical units and the nature of any equipment to be used to produce sounds or noise;

19. Other equipment or services necessary to conduct the special event with due regard for participant and public health and safety;

20. The number of persons proposed or required to monitor or facilitate the special event and provide spectator or participant control and direction for events using city streets, sidewalks, or facilities;

21. Provisions for first aid or emergency medical services, or both, based upon event risk factors;

22. Insurance information, if applicable;

23. Any special or unusual requirements that may be imposed or created by virtue of the proposed event activity;

24. Any other information reasonably required by the city manager.

I. The city manager may refer the application to such appropriate city departments as he/she deems necessary from the nature of the application for review, evaluation, investigation and recommendations by the departments regarding approval or disapproval of the application.

J. The city manager shall issue a permit under this chapter if the city manager finds that the following criteria have been met:

1. The proposed use of the property is not governed by or subject to any other permit procedures provided elsewhere in this code or other applicable laws, rules or regulations;

2. The event will not substantially interrupt the safe and orderly movement of aerial or marine navigation;

3. The event will not substantially interrupt public transportation or other vehicular and pedestrian traffic in the area of its location;

4. The event will not conflict with construction or development in the public right of way or at a public facility;

5. The event will not require the diversion of public safety or other city employees from their normal duties so as to unreasonably reduce adequate levels of service to any other portion of the city;

6. The concentration of persons, animals or vehicles will not unreasonably interfere with the movement of police, fire, ambulance, and other public safety or emergency vehicles on the streets;

7. The event will not unreasonably interfere with any other special event for which a permit has already been granted or with the provision of city services in support of other scheduled events or scheduled government functions;

8. The event will not have an unmitigatible adverse impact upon residential or business access and traffic circulation in the same general venue area;

9. If the event is a marathon, it will not occur within one hundred eighty (180) calendar days of another marathon unless such event receives prior approval by the city council;

10. The event will not adversely affect the city's ability to reasonably perform municipal functions or furnish city services;

11. The proposed use, event or activity will not have a significant adverse environmental impact;

12. That in the case of a block party or other similar neighborhood event, the applicants have submitted a petition in favor of the event which has been signed by individuals representing at least sixty six percent (66%) of the households on the block affected by the permit;

13. That the provisions of sections 5.60.080 and 5.60.090, if applicable, have been or will be satisfied.

K. In determining whether to approve a permit application for an event involving expressive activity, no consideration may be given to the message of the event, the content of the speech, the identity or associational relationships of the event organizer or its members or affiliates, or to any assumptions or predictions as to the amount of hostility which may be aroused in the public by

the content of the speech or the message conveyed during the event.

(Ord. C-7791 § 1, 2002).

5.60.050 Permit application - Fee.

A. Except as otherwise provided by this chapter, or when funded or waived by council resolution or ordinance, or other applicable law, rule or regulation, or by the terms of a permit, license, lease or contract which has been specifically authorized by the city council, any permit fee, application fee, daily fee, and other additional fee (other than departmental services charges) for the use of city streets or other city owned or controlled property pursuant to this chapter shall be established by the city council by resolution.

B. Any indigent natural person who intends to engage in "expressive activity" as defined in this chapter who cannot apply for a permit because of an inability arising from such indigence to pay the application fee shall not be required to pay the fee. Application for indigent status shall be made at the time of permit application and shall be accompanied by such relevant information and documentation as may, in the opinion of the city manager or his/her designee, be reasonably necessary to verify such status. For purposes of this section, "indigent natural person" includes, but is not limited to, a person eligible for county relief and support as an indigent person under section 17000 et seq., of the California Welfare

and Institutions Code or as said section(s) is/are amended from time to time.

(Ord. C-7791 § 1, 2002).

5.60.060 Permit – Term.

Any permit issued under this chapter shall not be for a period of more than two (2) consecutive days except as otherwise provided in this code; however, the city manager, upon timely application by a permittee, may extend the duration of any permit, except as otherwise provided in this code, for one additional period of not more than three (3) consecutive days if the city manager finds that all criteria set forth in subsection 5.60.040.J are being met and will continue to be met during the period of term extension.

(Ord. C-7791 § 1, 2002).

5.60.070 Permit – Denial or revocation.

A. The city manager may deny any application for a permit or revoke any permit if he/she finds any of the following:

1. The permitted event or activity will unreasonably disrupt traffic within the city; or

2. The permitted event or activity will unreasonably interfere with access to police or

fire stations, or other public safety facilities; or

3. The location of the event or activity will cause undue hardship to adjacent businesses or residents; or

4. The permitted event or activity will require the diversion of so many public employees that allowing the event would unreasonably deny service to the remainder of the city; or

5. The application contains incomplete, false or misleading information; or

6. The city manager is unable to make all of the relevant findings pursuant to subsection 5.60.040.J; or

7. The applicant fails to comply with all terms of this chapter including failure to remit all fees and deposits, or fails to provide proof of insurance and/or an indemnification agreement as required by this chapter; or

8. The event is proposed for a time and place for which another event permit has been or will be issued to a prior applicant; or

9. The proposed area for the assembly or for the set up or dispersal of a parade or demonstration could not physically accommodate the number of participants expected to participate in the assembly, parade or demonstration; or

10. The parade, assembly or demonstration is proposed to take place on the roadway

portion of any street in a commercial or retail zone between the hours of seven o'clock (7:00) A.M. and ten o'clock (10:00) A.M. or between the hours of four o'clock (4:00) P.M. and six thirty o'clock (6:30) P.M., Monday through Friday, unless the parade, assembly or demonstration will occur on a national holiday; or

11. The parade, assembly or demonstration will violate any federal, state or local law or regulation; or

12. The applicant is legally incompetent to contract or to sue and be sued; or

13. The applicant or the person or entity on whose behalf the application for permit was made has on prior occasions damaged city property and has not paid in full for such damage, or has other outstanding and unpaid debts to the city; or

14. The proposed event would present an unreasonable danger to the health or safety of the applicant, spectators, city employees, or members of the public; or

15. The applicant has not complied or cannot comply with applicable licensure requirements, ordinances or regulations of the city concerning the sale, offering for sale, or distribution of any goods or services.

B. The city manager may deny any application for a permit or revoke any permit if the city manager determines that the event sponsor or any agent, employee or associate of any such

event organizer has willfully made any false or misleading statement in an application or has not fully complied with the requirements of this chapter or has violated any of the provisions of this chapter or the provisions of any other applicable law, rule or regulation.

C. An event organizer whose permit application is denied, or whose permit is revoked, pursuant to this section shall be immediately notified of the action of denial or revocation, which notification shall contain a statement setting forth the reasons for said denial or revocation as well as a reference to the appeal provisions set forth in section 5.60.130. Notification, pursuant to this subsection, shall be deemed satisfied when the notice is placed, postage prepaid, in the United States mail, certified mail, return receipt requested, and addressed to the applicant at the address shown on the permit application.

(Ord. C-7791 § 1, 2002).

5.60.080 Insurance.

A. Each permit shall expressly provide that the permittee agrees to defend, protect, indemnify and hold the city, its officers, employees and agents free and harmless from and against any and all claims, damages, expenses, loss or liability of any kind or nature whatsoever arising out of, or resulting from, the alleged acts or omissions of permittee, its officers, agents or employees in connection with the permitted event or activity; and the permit shall expressly

provide that the permittee shall, at permittee's own cost, risk and expense, defend any and all claims or legal actions that may be commenced or filed against the city, its officers, agents or employees, and that permittee shall pay any settlement entered into and shall satisfy any judgment that may be rendered against the city, its officers, agents or employees as a result of the alleged acts or omissions of permittee or permittee's officers, agents or employees in connection with the uses, events or activities under the permit.

B. Except for block parties, concurrent with the issuance of a permit under this chapter and as a condition precedent to the effectiveness of the permit, the permittee shall procure and maintain in full force and effect during the term of the permit insurance as prescribed in regulations issued by the city manager pursuant to section 2.84.040.

C. If the city manager determines, after consultation with the city's risk manager and the city attorney, that a particular use, event or activity does not present a substantial or significant public liability or property damage exposure for the city or its officers, agents and employees, the city manager may give a written waiver of the insurance requirements of this section.

D. The insurance requirement set forth in this section shall not be construed to apply to parades or special events permitted under this chapter 5.60 involving expressive activity which enjoy protection under the United States or California

constitutions except that such parades or special events shall be required to either: (1) agree to indemnify, protect, defend and hold harmless the city, its officers and employees against all claims, damages, expenses, loss or liability of any kind or nature whatsoever arising out of, or resulting from, the alleged acts or omissions of permittee, its officers, agents or employees in connection with the permitted parade, event or activity; or (2) agree to redesign or reschedule the permitted event to respond to specific risks, hazards and dangers to the public health and safety identified by the city manager as being reasonably foreseeable consequences of the permitted parade or special event; or (3) provide insurance coverage as required by subsection 5.60.080.B.

E. A claim for exclusion and alternative treatment under subsection 5.60.080.D shall be filed with and at the same time as an application for a permit, and an agreement or proof of insurance, as applicable, shall be provided prior to permit issuance. The city manager or his/her designee may require such proof and documentation as he/she may deem reasonably necessary to verify the constitutionally protected status of the parade or event and the applicability of subsection 5.60.080.D.

(Ord. C-7934 § 7, 2004; Ord. C-7791 § 1, 2002).

5.60.090 Departmental services charge.

A. In addition to the payment of the nonrefundable permit application fee or daily fee, a permittee shall pay the city for all city departmental services charges incurred in connection with or due to the permittee's activities under the permit unless said departmental services charges are funded, partially funded or waived by action of the city council. Additionally, if city property is destroyed or damaged by reason of permittee's use, event or activity, the permittee shall reimburse the city for the actual replacement or repair cost of the destroyed or damaged property.

B. City departments shall submit the final invoices and billings for departmental services charges to the city manager or no later than twenty (20) business days after the event giving rise to the issuance of a permit.

C. The city manager shall determine the type of permitted parade, event or activity and calculate the final departmental services charge based on the following formulas, depending upon whether or not the event is privately funded or is funded in whole or in part by the city.

1. Type A is an event which is privately funded and the permittee will pay one hundred percent (100%) of the applicable fees or departmental services charges;

2. Type B is an event which is cosponsored by the city and the noncity permittee will pay fifty percent (50%) (or a negotiated portion) of

the applicable fees or departmental services charges;

3. Type C is an event funded by the city and the city will absorb one hundred percent (100%) of the applicable fees or departmental services charges incurred by the city.

D. Unless otherwise authorized by the city manager in writing, at least three (3) days prior to a parade, event or activity permitted under this chapter, the applicant shall pay to the city a deposit in an amount sufficient to cover the total estimated city departmental services charges which the city manager estimates will be incurred in connection with the permit. Said deposit shall be paid in cash or other adequate security as determined by the city manager, If the deposit is less than the final charges calculated pursuant to section 5.60.090, the permittee shall pay the difference to the city within ten (10) working days of being invoiced for such charges from the city. If the deposit is more than such final charges, the city shall refund the difference to the permittee within the sixty (60) days after the event.

E. Any indigent natural person who intends to engage in "expressive activity" as defined in this chapter who cannot obtain a permit because of an inability arising from such indigence to pay the departmental services charge may request the city manager to recommend an alternative parade, event or activity on a scale and at a time that would result in less costs assessed in accordance with section 5.60.090. Application for

indigent status shall be made at the time of permit application and shall be accompanied by such relevant information and documentation as may, in the opinion of the city manager, be reasonably necessary to verify such status. For purposes of this subsection 5.60.090.E, "indigent natural Person" includes, but is not limited to, a person eligible for county relief and support as an indigent person under section 17000 et seq., of the California Welfare and Institutions Code or as said code section(s) may be amended from time to time.

(Ord. C-7791 § 1, 2002).

5.60.100 Refunds.

If a permittee is unable to hold or conduct a use, event or activity because of inclement weather or due to some other cause not within the permittee's control, and the permittee submits a written request for the refund of such fees to the city manager's office within ten (10) days after the date that the use, event or activity was to have been held or conducted, the city manager may authorize the refund of the fees or a pro rata portion thereof, except for actual costs incurred by the city at the time of cancellation and the nonrefundable application fees, which have been paid by the permittee to the city in connection with a permit issued under this chapter.

(Ord. C-7791 § 1, 2002).

5.60.110 Interfering with activity prohibited.

It is unlawful for any person to obstruct, impede or interfere with any authorized assembly, person, vehicle or animal participating in a special event for which a special event permit has been issued.

(Ord. C-7791 § 1, 2002).

5.60.120 Penalty for violation.

Any person who intentionally violates any of the provisions of this chapter shall be guilty of a misdemeanor.

(Ord. C-7791 § 1, 2002).

5.60.130 Appeals.

A. Except as provided in this chapter, any person aggrieved by the issuance, denial or revocation of a permit pursuant to this chapter may appeal such decision to the city council by filing a written notice of such appeal with the city clerk within ten (10) business days of the decision of the city manager giving rise to said appeal. Such appeal shall set forth, with particularity, the facts upon which the appeal is being made. The city council shall, within sixty (60) days of receiving such notice of appeal, hold a hearing. At such hearing, the aggrieved party is entitled to be heard and present evidence on his/her behalf. The city council shall determine the merits of the appeal, and the city council's determination to

grant or deny the appeal shall be final. When the necessity for a timely response so requires, the city council may refer to the matter to a hearing officer in accordance with the provisions of chapter 2.93.

B. Alternatively to the provisions of subsection 5.60.040.E, any applicant for a special event permit who is engaging in or intends to engage in "expressive activity" as defined in this chapter and who is aggrieved by the denial or revocation of a permit pursuant to this chapter may, at his/her election, appeal to the city council in accordance with this section. However, any appeal taken pursuant to this section may, by necessity, involve the postponement or delay of the activity for which a permit is sought.

(Ord. C-7791 § 1, 2002).

5.60.140 Rules and regulations.

The city manager is authorized to promulgate additional policies, rules and regulations that are consistent with and that further the provisions set forth within this chapter and the provisions of law that pertain to the conduct and operation of a special event.

(Ord. C-7791 § 1, 2002).

5.60.150 Unlawful to use city name without authorization.

It is unlawful for any event organizer to use in the title of the event the words "The City of Long Beach" or "City of Long Beach", or facsimile of the seal or logo of the city of Long Beach without city's written authorization.

(Ord. C-7791 § 1, 2002).

[LOGO] **City of Long Beach**

Administrative Regulation

Number AR 8-28, Issue 1
Effective: February 8, 2007

I. Purpose

The purpose of this regulation is to set forth policies and procedures governing the implementation of Long Beach Municipal Code Chapter 5.60 (Parades and Special Events).

II. Scope

This regulation is applicable to all City departments and offices responsible directly to the City Manager. Any and all existing administrative regulations in conflict with this regulation are hereby rescinded. It is also requested that elective and other independent offices and departments of the City comply with these procedures in the interest of administrative uniformity.

III. Amendment

The City Manager may amend the procedures and contents set forth in this regulation from time to time as appropriate.

IV. Policy

A. For the purpose of implementing Long Beach Municipal Code § 5.60.010(I)(3), an activity

shall only be considered a special event if *both* of the following circumstances occur:

1. An organized activity involves seventy five (75) or more persons conducted by a person for a common or collective use, purpose or benefit which involves the use of, or has an impact on, public property or facilities; and

2. The activity is likely to require the provision of city services for the purpose of:

   a. street blockage,

   b. erecting barriers,

   c. construction,

   d. traffic control,

   e. crowd control, and/or

   f. litter abatement (for amounts in excess of that normally expected for the public property or facilities involved)

V. <u>Authorized By:</u>

_____

Christine F. Shippey,
Assistant City Manager

Supreme Court, U.S.
FILED
DEC 28 2009
OFFICE OF THE CLERK

No. 09-491

In The Supreme Court of the United States

CITY OF LONG BEACH,

Petitioner,

v.

LONG BEACH AREA PEACE NETWORK, DIANA MANN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a law requiring a permit for expressive activity on private and public property based solely on speculation as to whether the event may have an "impact" on public property or "may" require unspecified city services beyond those normally associated with the property is a valid time, place or manner regulation.

II. Whether Petitioner's adoption of an administrative regulation limiting the types of City services that may invoke a permit requirement for smaller events on private or public property moots Petitioner's claims for review on certiorari.

III. Whether a law vesting unbridled discretion to waive fees and charges for expressive activity in traditional public fora is a valid time, place or manner regulation where the record evinces capricious application of the provision.

IV. Whether an ordinance that authorizes officials to impose unspecified conditions on all "spontaneous" expressive activity and requires advance notice, even where the event would not otherwise be subject to the City's permitting scheme, provides ample alternative means of communication.

V. Whether a City may condition a permit for core expressive activity in public fora on a requirement to indemnify the City against all harm resulting from the activity, regardless of whether it is caused by the

QUESTION PRESENTED – Continued

permittee's acts or omissions, third parties not under the permittee's direction or control, or negligent and intentional wrongful acts of police or other City employees.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Respondent Long Beach Area Peace Network is an unincorporated association. Respondent Mann is an individual. Neither has a relationship to any corporation.

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STATEMENT OF THE CASE

Respondents refer to the Ninth Circuit's description of the relevant facts in this matter. Specifically, the Ninth Circuit found that the Long Beach Area Peace Network ("Peace Network") is "'an unincorporated, loosely organized group of peace activists without an office, organizational phone, organizational email or insurance.'" *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1015 (9th Cir. 2008). On February 15, 2003, prior to the start of the Iraq War, the Peace Network conducted a protest march and rally. *Id.* at 1016. Dr. Eugene Ruyle, on behalf of the group, filed an application for a "special event" permit, as required by the Long Beach Municipal Code ("LBMC"). *Id.* at 1015-16.

The march was held on public streets on the route required by the City. Several elected officials, including a City Council member, participated in the rally. *Id.* at 1016.

To obtain the permit, Dr. Ruyle was required to sign an agreement to "hold the City harmless from any liability caused by the conduct of the event"; that the "City will not be liable for any mishaps or injuries associated with the event"; and that "[f]ull responsibility for activities at the event will be assumed by [the LBAPN]." *Id.* (edits in original). After filing the application, Ruyle wrote to the City, seeking a waiver of the permit application fee as well as the departmental services charges. No fee or service charges were assessed for the February event. *Id.*

One month later, on March 22, 2003, in anticipation of the start of the bombing of Baghdad, the Peace Network scheduled another march and rally. Ruyle had submitted a request for this event on March 18, 2003, seeking a permit for the march and rally as a "spontaneous" event, which is defined in the LBMC as being "'occasioned by news or affairs coming into public knowledge within five (5) days of the event.'" 522 F.3d at 1016, *citing* LBMC § 5.60.030(A)(5). Ruyle estimated the event would be twice the size of the February 2003 march and rally, which involved 1,000 to 1,500 participants. *Id.*

The City approved the request, calculating charges for the event at $7,041, to be paid in four installments. Ruyle and other Peace Network members signed the agreement as individuals, adding a handwritten notation that they reserved the right to challenge the charges. *Id.* Ruyle paid the first installment of the charges to obtain the permit; however, the City misplaced the check. *Id.* at 1017.

Approximately 1,000 people participated in the March 2003 event, but no elected officials were involved. *Id.* During the march, members of the Surfrider Foundation briefly stood their surfboards in the sand to form the shape of a peace symbol as the marchers crossed on an overpass above the beach. "The display took place entirely on the beach, did not

interfere with any vehicular or pedestrian traffic, and did not result in any damage to the beach." *Id.*

After the March 2003 event, Ruyle wrote to the City, asking for a waiver of the charges, as he had done after the February event. 522 F.3d at 1017. City officials gave Ruyle "'no other guidelines than simply to write the letter to ask for a waiver.'" *Id.*

Without explanation, the City declined to waive charges for the March 2003 event and then requested payment for the remainder of the $7,041 estimated charges, now including $1,500 for use of the beach for the surfboard peace symbol display. *Id.* When the permittees did not pay, the City sued them in state court and obtained a judgment for $5,901.[1] The state court disallowed the charge for the surfboard display as it was "'not sufficiently justified as to actual costs'" and "'an improper restraint of expression.'" *Id.* at 1016.

The Ninth Circuit found evidence of "content-based favoritism" in the provision vesting unbridled discretion in the City Council to grant or deny waivers of fees and charges. *Id.* at 1043. The Ninth Circuit noted that the precise vice inherent in the LBMC's standardless waiver provision was evinced by the City's unexplained treatment of the waiver requests in the 2003 events, just one month apart,

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[1] Petitioner erroneously states that this action was brought against the Peace Network. Petitioner sued only the five individuals who had signed the permit. 522 F.3d at 1018.

with elected officials participating in the first, but not the second protest after the Iraq War began. 522 F.3d at 1043.

REASONS FOR DENYING THE PETITION

No conflict exists between the decision in *Long Beach Area Peace Network* and the precedents of this Court or the decisions of any other Circuit. Petition at pp. 9-13. The Ninth Circuit applied the correct legal principles to analyze Petitioner's parade and assembly ordinance and its decision is completely consistent with this Court's holdings and those of every other Circuit to consider similar claims.

Petitioner's argument depends upon shifting focus from this case and arguing that *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc), departed from this Court's precedents and was wrongly decided, as urged by the dissent in *Berger*. Petition at p. 10. This is not the *Berger* case. While both *Berger* and *Long Beach Area Peace Network* involve First Amendment issues, the similarity ends there.

Peace Network addresses an ordinance regulating parades, assemblies and other "organized assemblages" in all public fora in Long Beach. *Berger*, on the other hand, involves regulations aimed at combatting "aggressive solicitation" by street performers at one specific forum, the Seattle Center, by requiring a "permit and badge" for street performers and restricting the performers' access to areas where

"captive audiences" wait to get into various facilities at the Seattle Center. 569 F.3d at 1034-35. None of these issues are raised in *Peace Network*, making *Berger* completely inapt.

In *Peace Network*, the Ninth Circuit affirmed Petitioner's right to regulate expressive activity in traditional public fora through narrowly-tailored laws and rejected five challenges by Respondents to the ordinance, but found that Petitioner had not met its burden as to four other provisions in the ordinance. *Peace Network*, 522 F.3d at 1015. The only sections of LBMC § 5.60 invalidated were the catch-all third category of "any other" special event, the illusory permitting exemption for "spontaneous" expression, the sweeping "hold-harmless" provision, and the unbridled discretion given to City Council members to waive fees and departmental charges. *Id.*

Throughout the course of this litigation, Petitioner has unsuccessfully advanced a shifting series of arguments. In its supplemental briefing to the Ninth Circuit prior to the argument before the panel and in its petition for rehearing, Petitioner urged that its ordinance was identical to those in *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006) and *Southern Oregon Barter Fair v. Jackson County*, 372 F.3d 1128 (9th Cir. 2004), in which the Ninth Circuit applied *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) to reject challenges to the constitutionality of special events permit schemes. The Ninth Circuit correctly rejected Petitioner's comparison.

Having failed to convince even a single judge of the Ninth Circuit to vote for rehearing or en banc review in this matter, Petitioner now abandons the argument that its ordinance mirrors the ones upheld in *Santa Monica Food Not Bombs* and *Southern Oregon Barter Fair*. Instead, Petitioner now argues that the Ninth Circuit's decision conflicts with this Court's holdings in *Thomas, supra*; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984); *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941); and *Poulos v. New Hampshire*, 345 U.S. 395 (1953). There is no conflict between *Peace Network* and any Supreme Court case.

Petitioner also attempts to mislead the Court by misstating the factual record[2] and by claiming that its ordinance says something it does not. Through extensive use of ellipsis, Petitioner has drastically edited its "hold-harmless" provision to suggest a far narrower scope than the actual language creates.[3]

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[2] Petitioner asserts that the February 2003 march took place on a sidewalk, which is why it incurred no charges. Petition at p. 6. Petitioner also states that no charges would have been assessed for the March 2003 event if Respondents had agreed to march in the bike path. Petition at p. 7. Both statements are false. The February march took place in the street. Appellants' Excerpt of Record in the Court below ("AER") 5 [Ruyle Dec. at ¶4]. The March 2003 event written cost estimate provided to Respondents for using the bike path was only slightly less than for use of the street, estimated at $2,396 and $3,764 respectively. AER 14.

[3] *See* Petition for Certiorari at p. 4.

App. 213-15. This excision is not an authoritative construction limiting the scope of the provision.

Petitioner also misstates the Ninth Circuit's ruling on the LBMC categories of Special Events. The Ninth Circuit did *not* suggest that Petitioner could not impose reasonable time, place and manner regulations on large special events in the City. To the contrary, *Peace Network* affirmed the constitutionality of Petitioner's two main categories of special events, but found the third catch-all category unconstitutional because it was not restricted to assemblies on public property and it required a permit for events based upon some vague conjecture about possible "impact" on public property and potential impact on unidentified and undefined public services which did not advance Petitioner's public safety interests. *Peace Network*, 522 F.3d at 1033-36. This decision is fully consistent with the Sixth Circuit's decision in *American-Arab Anti-Discrimination Committee v. Dearborn*, 418 F.3d 600, 614 (6th Cir. 2005).

Petitioner also misstates the decision of the Ninth Circuit and argues that *Peace Network* held that a City could not require permittees to indemnify the City for parades and assemblies. Petition at pp. 34, 39. To the contrary, the Ninth Circuit expressly upheld indemnification but, nonetheless, found Petitioner's specific provision unprecedented in its scope because it made permittees responsible not only for harm caused by their own acts and omissions, but also for intentional or negligent acts against the permittee and others by police and other

city employees, and for the acts of third parties not under the control of the permittee.

Lastly, *Peace Network* correctly held that the provision authorizing any City Council member to waive all fees and costs for a special event lacked any standards and was not narrowly tailored. LBMC § 5.60.050(A). Without any guidelines cabining the official's discretion, and with evidence in the record showing that Respondents had been granted and denied waivers of fees and charges for anti-war protests, while other activists received waivers for a "peacefest," all without explanation, this provision is impermissibly vague.

In holding these four provisions of the ordinance unconstitutional, the Ninth Circuit followed the precedents of this Court and the resulting opinion is consistent with this Court's decisional law and that of other Circuits.

I. THE DECISION BY THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OR ANY CIRCUIT REVIEWING REASONABLE TIME, PLACE AND MANNER REGULATIONS OF EXPRESSIVE ACTIVITY IN ALL PUBLIC FORA IN THE CITY

This Court has instructed that content-neutral laws are constitutional only if they do not delegate overly broad permitting discretion to a public official, are narrowly tailored to serve a significant government

interest, and leave open ample alternatives for communication of information, but "even content-neutral time, place and manner restrictions can be applied in such a manner as to stifle free expression." *Thomas*, 534 U.S. at 323. *Id.* To pass constitutional muster, an ordinance must contain "'narrowly drawn, reasonable and definite standards' that are 'reasonably specific and objective, and do not leave the decision to the whim of the administrator.'" *Id.* at 324. The LBMC fails these requirements.

A. No Conflict Exists Between the Ninth Circuit's Decision Voiding Only the Catch-All Third Category of "Special Events" and the Decisions of This Court's or Other Circuits' Precedents

Petitioner's "Special Events" ordinance sets forth three categories of permit requirements. The first category requires a permit for any parade, procession, etc. on streets or sidewalks that does not comply with applicable traffic regulations. App. 190 (LBMC § 5.60.010(I)(1). The second category requires a permit for any "organized assemblage" of 75 or more persons at any "public place, property or facility" gathered for a "common purpose under the direction or control of a person." *Id.* § 5.60.010(I)(2). The third category requires a permit for "[a]ny other organized activity involving 75 or more persons conducted by a person for a common or collective use, purpose or benefit, which involves the use of, or *has an impact on*, public property or facilities and which *may* require

the provision of city public services in response thereto." App. 194 § 5.60.010(I)(3) (emphasis supplied).[4]

Petitioner is not without the authority to regulate large "special events" in the City. Only the third category of "special event" was held unconstitutional in *Peace Network*. An event that will interfere with traffic requires a permit under the first category. Any "organized assemblage" of 75 or more persons in a public place requires a permit under the second category. But the third category is obtuse.

There is no dispute that Petitioner has a compelling interest in requiring a permit for events based on public safety concerns, including traffic regulation, street closures and street barriers. *Peace Network*, 522 F.3d at 1036. "Regulations of the use of a public forum that ensure the safety and convenience of the people are not inconsistent with civil liberties. . . ." *Thomas*, 534 U.S. at 323 (internal quotation marks and citation omitted). Beyond these well-recognized interests, as the Sixth Circuit recently agreed, requiring a permit based solely on speculation about the need for other unspecified city services is "unconstitutionally vague because it offers no guidance to citizens regarding when they would be required to apply for a permit." *American-Arab Anti-Discrimination*

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[4] The Ninth Circuit found the distinction between the second and third categories barely discernible. 522 F.3d at 1034. The third category is largely, if not entirely, subsumed in the second category and is therefore surplusage. *Nunez v. City of San Diego*, 114 F.3d 935, 941 (9th Cir. 1997).

Committee v. Dearborn, 418 F.3d 600, 614 (6th Cir. 2005). Unsupported conjecture may not form the basis for First Amendment restrictions. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000). For this reason, as in *Dearborn*, the Ninth Circuit correctly held that the third category of special event is "not narrowly tailored to serve a substantial governmental interest." 522 F.3d at 1036.

1. Petitioner's amended administrative regulation, listing City services that may require a permit under the third category of special events, moots Petitioner's claim

In the course of this litigation, Petitioner has twice enacted an administrative regulation listing the public services which might necessitate a permit for the third category of special events on public or private property. The first administrative regulation was adopted just one week before oral argument. It identified six categories of activity "likely to require the provision of city services": street blockage, erecting barriers, construction, traffic control, crowd control "and/or . . . litter abatement (for amounts in excess of that normally expected for the public property or facilities involved)." App. 224. This was the first time that "litter abatement" was at issue in this litigation.

The Ninth Circuit correctly held that only the services for traffic control, street closures and

erecting barriers furthered the government's compelling interest in public safety. To the extent the administrative regulation authorized litter abatement, crowd control and construction as separate and independent bases to require a permit, the Ninth Circuit held that the regulation was not narrowly tailored and did not cure the constitutional deficiencies in this provision.

On remand from the Ninth Circuit, Petitioner amended the administrative regulation to limit the consideration of "impact" on public services to street blockage, erecting barriers and/or traffic control. App. 1-2 (AR 8-28). Litter abatement is no longer a basis for requiring a permit for expressive activity under Petitioner's third category of Special Events.

A court will review only the current version of an ordinance, including any newly adopted administrative regulations construing the law. *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) ("a federal court must . . . consider any limiting construction that . . . [an] enforcement agency has proffered.") (edits supplied). *See also Forsyth County v. Nationalist Movement,* 505 U.S. 123, 131 (1992). A previously viable claim will be mooted by recently promulgated administrative regulations. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal citation omitted). *See also Santa Monica Food Not Bombs*, 450 F.3d at 1035.

Petitioner's amended regulation moots its argument on this claim since it eliminates all but the three justifications that the Ninth Circuit held advanced Petitioner's compelling interest in public safety and supported requiring an advance permit. *Peace Network*, 522 F.3d at 1035-36.

2. Litter abatement is not a substantial government interest requiring a permit for expressive activity

Petitioner contends that it has an interest in recouping financially for litter caused by large events on public property. In support of this argument, Petitioner cites to examples such as the Long Beach City Marathon and the Toyota Grand Prix, involving thousands of people at each event.[5] Petition at p. 18. Most certainly, these events are included within the first two categories of special events as both the Marathon and the Grand Prix would require closure of streets for the events and involve well more than 75 people. In these categories, Petitioner may recoup a myriad of costs for these events, including City expenses for clean-up, and may impose conditions on

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[5] A permit requirement solely to recoup the costs of litter abatement impacts an auto race far differently from the burden it places on a protest of a Town Hall meeting with the president or other elected officials on health care, for example. There are marginal, if any, First Amendment interests in the Grand Prix.

construction of structures used in such "special events."[6]

Seventy years ago, this Court held that "the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution." *Schneider v. New Jersey*, 308 U.S. 147, 165 (1939). *See also*, *Martin v. Struthers*, 319 U.S. 141, 143 (1943) ("minor nuisance of cleaning litter from the streets"). The City has the power to punish those who toss leaflets on the ground, as opposed to those who hand them out. *Schneider*, 308 U.S. at 162-63. *Accord*, *Jews for Jesus*,

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[6] Under the LBMC, Petitioner may recoup the cost of litter abatement, construction and crowd control at large events. LBMC § 5.60.020(D)(6) allows a cleaning deposit for events that include structures, display or use horses, food or beverage distribution or sales or the sale of goods or services. LBMC § 5.60.020(D)(8) allows a permit to be conditioned on a having a waste management plan, and clean up and restoration of the event site. LBMC § 5.60.020(E) permits reimbursement for charges the City incurs for City services. LBMC § 5.60.020(D)(3) authorizes Petitioner to impose reasonable requirements for "structures to be displayed or used in the event." LBMC § 5.60.020(D)(5) allows the City to impose conditions on structures used in the special event. LBMC § 5.060.020(D)(1) addresses crowd control by requiring, *inter alia*, assembly or disbanding area for a parade or like event, and LBMC § 5.60.020(D)(3) authorizes permit conditions designed to avoid or lessen interference with public safety functions and/or emergency services access. App. 196-97. None of these provisions were invalidated by the Ninth Circuit, so Petitioner has an arsenal of tools it may use apart from the vague provisions of LBMC § 5.60.010(I)(3).

Inc. v. MBTA, 984 F.2d 1319, 1324 (1st Cir. 1993). No decision of this Court or any Circuit is in conflict with the Ninth Circuit's ruling on this issue.[7] *See Krantz v. City of Fort Smith*, 160 F.3d 1214, 1219 (8th Cir. 1998). Standing alone, Petitioner's interest in prevention of littering is insufficient to justify requiring a permit to engage in expressive activity under the third category of special events. *See ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1106 (9th Cir. 2003).

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[7] Petitioner contends that *Horina v. The City of Granite City*, 538 F.3d 624 (7th Cir. 2008), establishes that litter abatement is a substantial government interest. Petition at p. 19. In fact, *Horina* invalidated a law regulating handbill distribution because it found that the City had not shown it furthered a substantial government interest. *Id.* at 634. Petitioner also argues that *Peace Network* conflicts with *Paulsen v. Gotbaum*, 982 F.2d 825 (2nd Cir. 1992). Petition at p. 18. *Paulsen* upheld a rule that "restrict[ed] soliciting or leafletting [to a stationary area] only during special events, when the large crowds may cause congestion and create more litter." *Id.* at 829 (bracketed edit supplied). *Paulsen* applied *Heffron v. International Soc. For Krishna Consciousness*, 452 U.S. 640 (1981), a case with no relevance to Petitioner's parade and assembly ordinance. Understandably, *Paulsen* does not discuss *Schneider* because the ordinance in *Paulsen* only restricted the location of leafletting at large events and did not impose a financial burden on leafletters to recoup the costs of litter abatement.

B. The Ninth Circuit Applied Well-Established Precedents to Hold the "Spontaneous" Speech Provision Did Not Provide Ample Alternatives for Communication on Timely Issues

The Ninth Circuit correctly held that the "spontaneous events" provision in the Long Beach ordinance was unconstitutional because it was not narrowly tailored and applied to both public and private properties "where there is no threat of disruption of the flow of pedestrian or vehicular traffic," undermining the City's interest in requiring advance notice. 522 F.3d at 1037-38.

Both this Court and the Ninth Circuit have repeatedly held that, an ordinance regulating expressive activity must allow ample alternatives for "spontaneous" response to "'late breaking events'," 522 F.3d at 1036, citing *Santa Monica Food Not Bombs*, 450 F.3d at 1047. Otherwise "'[i]mmediate speech can no longer respond to immediate issues.'" 522 F.3d at 1037, citing *NAACP v. City of Richmond*, 743 F.2d 1343, 1355 (9th Cir. 1985). "[W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Id.*, citing *Shuttlesworth v. City of Birmingham, Alabama*, 394 U.S. 147, 163 (1969). *See also Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 182 (1968) ("delay 'of even a day or two' may be intolerable when applied to 'political' speech in which the element of timeliness may be important"). In Long Beach, "'the quantity of

effective speech is limited.'" 522 F.3d at 1038, citing *City of Richmond*, 743 F.2d at 1356.[8]

In *Food Not Bombs*, the Ninth Circuit upheld a "spontaneous" speech exemption that allowed large assemblies without notice to the City at any time on the lawn of City Hall. 450 F.3d at 1048. Santa Monica's ordinance also provided a "safe harbor" for expressive activity on sidewalks and park paths as a second alternative for groups as large as 2,000 persons. *Id.* Santa Monica required advance notice for "organized" events only and "exempted 'unorganized' gatherings" entirely from permits for "spontaneous" events. *Peace Network*, 574 F.3d at 1037, citing *Food Not Bombs*, 450 F.3d at 1049. Moreover, during the course of that litigation, the Santa Monica ordinance was amended to allow notice for larger spontaneous events to be given to the police department at any time when the city manager's office was not open to prevent critical time delays caused by holidays and weekends. *Id.*

There are no similarly ample alternatives for spontaneous expressive activity in Long Beach. LBMC § 5.60.030(B) exempts spontaneous expressive activities from the special events permitting requirements but then expressly authorizes the city manager

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[8] To the extent that Petitioner argues that *Poulus*, 345 U.S. 395, limits the ability of Respondents and others to engage in spontaneous expressive activity wherever one wants, that is not an issue here. Petitioner has the authority to impose reasonable time, place and manner regulations, but has not done so.

to impose conditions, without identifying what they may be, on all "spontaneous parades, assemblies or demonstrations . . . *whether or not* said activities are governed by the permit requirements set forth in this chapter." App. 210-11 (emphasis and edits supplied). This provision swallows the purported exemption for "spontaneous" speech.

A law requiring permission to engage in expressive activity is a prior restraint on speech. *City of Lakewood v. Plain Dealer Publishing*, 486 U.S. 750, 755 (1988). Petitioner requires notice, reserves the right to deny permission and to impose conditions on all "spontaneous" speech in the City. This provision is not narrowly tailored and burdens far more speech than necessary because it imposes heavier burdens on expressive activity simply because it is "spontaneous." No substantial government interest is furthered by this regulation since, but for the "spontaneous" nature of the speech, a similar activity would not generate a permit requirement based on the government's interests in maintaining public safety and regulating competing uses of public fora.

Petitioner's ordinance also expressly requires 24-hours advance notice to the city manager for *all* spontaneous "assemblies." The concept of a "safe harbor" in Long Beach similar to the one in *Food Not Bombs* is wholly illusory. Thus "spontaneous" expression may be more heavily burdened than planned assemblies in Long Beach at the unfettered whim of City officials.

C. No Conflict Exists Between the Decision in *Peace Network* and the Decision of This Court or Any Circuit Concerning the "Indemnification" Provision Held Unconstitutional in This Case

The Ninth Circuit expressly upheld Petitioner's ability to require indemnification, including an insurance requirement, but invalidated the specific provision in the LBMC imposing unprecedented sweeping and absolutely liability for any and all harm and damages resulting from protected expressive activity. 522 F.3d at 1037-40. Petitioner contends that in so holding, the Ninth Circuit took this Court's decision in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), "out of context" and ran afoul of the Court's decisions in *Thomas*, as well as *Cox*, 312 U.S. 569 and *Clark*, 468 U.S. 288.[9] Petition for Rehearing at pp. 7-8. Petitioner further contends that the Circuit cited no authority for its holding. *Id.* at p. 9. On both contentions the City is wrong.

First, as the Ninth Circuit noted, to obtain a permit the individual or organization must sign an application that contains a "hold-harmless" provision far broader than the Code provision. App. 214-15 (LBMC § 5.60.080). This application requires a permittee to hold the City harmless "from *any liability*

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[9] Petitioner has now abandoned the argument made in its petition for rehearing that the Ninth Circuit's ruling on this issue conflicted with the Circuit's decision in *Food Not Bombs*.

caused by the conduct of the event." 522 F.3d at 1039 (emphasis in original). The court correctly held that "the phrase 'any liability caused by the conduct of the event,' is susceptible to a broad reading, encompassing liability caused by the acts or omissions of any person or entity involved in the event, including acts and omissions not only of the permittees but also of the City and third parties." *Id.*

The Ninth Circuit correctly found that Petitioner's indemnification provision is not narrowly tailored to serve a substantial government interest for three reasons, each of which is independently sufficient to hold this provision unconstitutional. First, the sweeping scope of the "hold-harmless" agreement violates the bedrock principle that "governments may not 'recoup costs that are related to listeners' reaction' to speech." *Id.* at 1040, citing *Forsyth County*, 505 U.S. at 135 n.12. Petitioner's "indemnification and hold-harmless clauses contain no exclusion for losses to the City occasioned by the reaction to the permittees' expressive activity," impermissibly allowing the City to pass such charges on to the permittee if their event provokes a hostile reaction. *Id.* The "government may not 'produce a result which [it] could not command directly.' [Citation.]" *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

Second, the "hold-harmless" agreement extinguishes the right of a permittee to vindicate constitutional rights violations committed by the City during the expressive activity. 522 F.3d at 1040, citing *Orin v. Barclay*, 272 F.3d 1207, 1216 (9th Cir. 1991).

If the government would not be entitled to qualified immunity for violating the constitutional rights of a speaker, it certainly could not require the speaker to waive fundamental rights as a condition of obtaining a permit in the first place. *Id.*

Third, the hold-harmless provision "requires permittees to assume legal and financial responsibility for even those 'activities at the event' that are outside the control of the permittee, indeed including activities of the City.[10] *Id.*

The Ninth Circuit measured Petitioner's indemnification provision against the First Amendment limits on tort liability announced in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a case which Petitioner does not even address. *Claiborne Hardware* established that "'[t]he presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages[.]'" *Peace Network*, 574 F.3d at 1040, citing 458 U.S. at 916-17. Liability may not be imposed "'merely because an individual belonged to a group, some members of which committed acts of

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[10] The contract permittees must sign underscores the expanse of this provision. The Application for a Permit requires an individual to agree that "[an] organization will hold the City harmless from any liability caused by the conduct of the event. Full responsibility for activities at the event will be assumed by the organization." Petitioner's Excerpt of Record in the Court below ("ER") 38.

violence.'" *Id.* at 1041, citing 458 U.S. at 920. Adhering to this principle, the Ninth Circuit correctly held that Petitioner's indemnification provisions would penalize "substantially more speech than the liability found unconstitutional in *Claiborne Hardware*." *Id.*

The Long Beach indemnification provisions are also far broader than those upheld by the Ninth Circuit in *Food Not Bombs*, which limited liability to the "alleged willful or negligent acts or omissions of permittee, its officers, agents or employees in connection with the permitted event or activity." *Id.*, citing *Food Not Bombs*, 450 F.3d at 1056 n.10 (internal quotation marks omitted in original). Petitioner contends, however, that *Peace Network* conflicts with the decisions of the Third Circuit in *Nationalist Movement v. City of York*, 481 F.3d 178 (3rd Cir. 2007), and the Eighth Circuit in *Jacobson v. Harris,* 869 F.2d 1172 (8th Cir. 1989). Petitioner is wrong on both counts. The indemnification provision in *Nationalist Movement* was limited by its explicit terms to liability for "'any damage or injury occurring in connection with the permitted event *proximately caused by the action*' of the speaker." 481 F.3d at 186 n.9. This is the type of narrow-tailoring absent in this case. Similarly, *Jacobson*, a case involving an insurance requirement indemnifying a city against injuries resulting from the placement of newsracks

on city property, does not present a conflict with the hold-harmless provision at issue here.

In an attempt to narrow its ordinance, Petitioner has engaged in heavy editing of the actual language, taking out whole phrases and key words. Petition at p. 4. If Petitioner wants to amend its ordinance to incorporate these edits it may, but these redactions do not constitute an authoritative construction of the ordinance and, thus, do nothing to limit the unconstitutional breadth of this provision.

D. No Conflict Exists Between the Decisions of This Court or Any Circuit Regarding the Standardless Waiver Provision Invalidated By the Ninth Circuit in *Peace Network*

In its petition for rehearing, the government contended that the Ninth Circuit's ruling on the unconstitutionality of the waiver provision conflicted with the Circuit's decision in *Southern Oregon Barter Fair*, 372 F.3d 1128, the Supreme Court's decision in *Thomas* and the decision of the Sixth Circuit in *Parks v. Finan*, 385 F.3d 694, 699-700 (6th Cir. 2004), which relied on *Thomas* to uphold a provision virtually identical to the waiver at issue in *Thomas*. Petition at pp. 12-13. Now, Petitioner has abandoned the argument that a conflict exists with *Southern Oregon Barter Fair*, focusing solely on *Parks*.

In *Southern Oregon Barter Fair,* the Ninth Circuit underscored that the government may charge

fees to administer a permit scheme. 372 F.3d at 1139, citing *Cox*, 312 U.S. at 577.[11] At the same time, the Ninth Circuit reiterated this Court's instruction that "[t]his principle is subject to an important limitation: the regulation must provide objective standards that do not leave the amount of the fee to the whim of the official, enabling the official to favor some speakers and suppress others." *Id.*, citing *Forsyth County*, 505 U.S. at 130-33. "[A] time, place, and manner regulation must 'contain adequate standards to guide the official's discretion and render it subject to effective judicial review.'" *Id.*, citing *Thomas*, 534 U.S. at 323 (citation omitted in original). The Ninth Circuit correctly applied these same principles to the waiver provision in *Peace Network*. 522 F.3d at 1042. No standards exist in this instance to guide implementation of Petitioner's waiver provision.

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[11] Petitioner contends that "[t]his case epitomizes the difficulty courts have in balancing the countervailing First Amendment interests expressed in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), against the legitimate governmental interests expressed in *Cox v. New Hampshire*, 312 U.S. 569 (1941)." Petition at p. 13. Yet, this Court in *Forsyth* readily distinguished *Cox*, noting that "[u]nlike this case, there was in *Cox* no testimony or evidence that the statute granted unfettered discretion to the licensing authority." 505 U.S. at 133 n.11, 136-37. The same distinction exists here, where the Ninth Circuit expressly recognized *Cox* in finding that the overall permitting scheme here was a reasonable time, place and manner regulation, 522 F.3d at 1027, as it did in finding the unbridled discretion to grant or deny fee and cost waivers unconstitutional. *Id.* at 1042.

Petitioner contends that the decision in *Peace Network* conflicts with this Court's holding in *Thomas* for two reasons. First, Petitioner argues that a law may be invalidated based on the vice of "unbridled discretion" only when it creates an "absolute prohibition" on First Amendment activities. Petition at p. 24. Tellingly, Petitioner does not cite to any specific language in *Thomas* to support this sweeping proposition.

Rather, Petitioner improperly conflates this argument with its claim that the Ninth Circuit did not follow *Thomas*' instruction that a waiver provision "furthers, rather than constricts, free speech." *Thomas,* 523 U.S. at 325. This Court described the waiver in *Thomas* as expanding the opportunity for speech because it permitted officials to ignore the failure "to meet the technical requirements of the ordinance but for one reason or another pose no risk of the evils that those requirements are designed to avoid." *Id.* at 325. The waiver provision here does not affect mere "technicalities." As the record evinces, this provision allows a single City Council member to waive substantial charges for core political speech in archetypal public fora. This is no mere "technicality" to be remedied.

Contrary to Petitioner's assertion, neither this Court nor the Sixth Circuit in *Parks*, relying on *Thomas,* holds that *Thomas* created a categorical restriction on voiding all or part of a permitting scheme that vested public officials with the unrestricted authority to "waive" key provisions. *Parks* held, as

did the Ninth Circuit in *Southern Oregon Barter Fair*, that "[w]hen a permitting authority uses waivers to promote preferred speakers or to inhibit disfavored speakers, a court may invalidate the waiver scheme." 372 F.3d at 700, citing *Thomas* at 325.

In fact, after *Parks*, the Sixth Circuit invalidated a provision vesting City officials with unbridled discretion to waive advance permit requirements to engage in core expressive activities on streets and sidewalks. *American-Arab Anti-Discrimination Committee*, 418 F.3d 600. Petitioner's ordinance suffers from the same constitutional flaws.

> The City points to this practice of granting waivers as a means of saving the Ordinance from a lack of narrow tailoring. . . . [T]he City points to no provision in the Ordinance, past practice, or narrowing construction that specifies standards by which it makes its waiver decisions. While we embrace the broad latitude and flexibility extended to waiver schemes generally, *Parks*[, *supra*, at p.700], the city of Dearborn's "unwritten policy of waiving the permit requirement" is "opaque," and lacking in sufficient notice and standards to guide city officials. [Citations.]

418 F.3d at 607. *See also CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1280 (11th Cir. 2006) (invalidating fee waiver provision that lacked "objective standards" to prevent discriminatory application).

Petitioner's reliance on *Parks* to suggest a conflict among the Circuits is misplaced for a second reason. In *Parks*, the plaintiff "produced no evidence that [the permitting agency] used its discretion to grant waivers to preferred speakers, or deny waivers to disfavored speakers." *Id.* at 700. By contrast, ample evidence here evinces that the unbridled discretion inherent in Petitioner's waiver provision has been used capriciously to impose a substantial financial burden on Respondents.

This Court has repeatedly instructed that courts should look to any regulations or other authoritative statements of the scope of a challenged regulation. The Ninth Circuit has consistently applied this rule, noting that it is "common to consider a city's authoritative interpretation of its guidelines and ordinances." *Food Not Bombs*, 450 F.3d at 1035, citing among other authorities, *Forsyth County*, 505 U.S. at 131 ("In evaluating [a] facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it.").

"To affect the constitutional analysis, such a limiting construction must 'be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.'" 450 F.3d at 1035, citing *City of Lakewood*, 486 U.S. at 770. Petitioner can point to "no provision of the Ordinance, or to any implementing regulation, that guides the City Council's decision whether to fund or waive fees and charges." *Peace Network*, 522 F.3d at 1042.

Without standards or guidelines, officials have uncabined authority to burden expressive events in the City. AER 30 (LBMC § 5.60.090 "Departmental service charges"). In this case, if Respondents had been willing to convey a message of "peace," rather than an "anti-war" message in 2004, no doubt they would have received a waiver of costs again. AER 6-7, ¶8. Most certainly, the waiver provision fails the test of a narrowly-tailored time, place and manner regulation because it lacks any standards or guidelines to prevent the arbitrary and capricious application of the provision that Respondents have suffered.

II. CONCLUSION

For all of the foregoing reasons, the decision in *Peace Network* presents no conflict with the precedents of this Court or the decision of any Circuit and

was correctly decided on the facts of this case. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: December 28, 2009

[LOGO] ***City of Long Beach***

Administrative Regulation

(Filed Sep. 23, 2009)

Number AR 8-28, Issue 2
Effective: September 22, 2009

I. Purpose

The purpose of this regulation is to set forth policies and procedures governing the implementation of Long Beach Municipal Code Chapter 5.60 (Parades and Special Events).

II. Scope

This regulation is applicable to all City departments and offices responsible directly to the City Manager. Any and all existing administrative regulations in conflict with this regulation are hereby rescinded. It is also requested that elective and other independent offices and departments of the City comply with these procedures in the interest of administrative uniformity.

III. Amendment

The City Manager may amend the procedures and contents set forth in this regulation from time to time as appropriate.

IV. Policy

A. For the purpose of implementing Long Beach Municipal Code § 5.60.010(I)(3), an activity shall only be considered a special event if *both* of the following circumstances occur:

1. An organized activity involves seventy five (75) or more persons conducted by a person for a common or collective use, purpose or benefit which involves the use of, or has an impact on, public property or facilities; and

2. The activity is likely to require the provision of city services for the purpose of:

   a. street blockage,

   b. erecting barriers, and/or

   c. traffic control,

V. *Authorized By:*

/s/ _____

Patrick H. West,
City Manager

Supreme Court, U.S.
FILED
JAN 11 2010
OFFICE OF THE CLERK

No. 09-491

In The Supreme Court of the United States

CITY OF LONG BEACH,

Petitioner,

v.

LONG BEACH AREA PEACE NETWORK;
DIANA MANN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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INTRODUCTION

This case represents a fundamental error in interpreting "the distinction between permits designed to censor and those designed to regulate competing uses in public areas." *Berger v. City of Seattle*, 569 F.3d 1029, 1066 (9th Cir. 2009) (Chief Judge Alex Kozinski, dissenting) (citing *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002)).

As in *Thomas v. Chicago Park District*, the Long Beach special event ordinance ("Ordinance") does "not [seek] to exclude communication of a particular content, but to coordinate multiple uses of limited space . . . and to assure financial accountability for damage caused by . . . [a special] event" conducted on public property. *Thomas*, 534 U.S. at 322. Indeed, on all occasions, Respondents obtained a permit from the City and conducted their special event as requested.

The Respondents' and the Ninth Circuit's determination that the Long Beach Ordinance is unconstitutional ignores the above distinction re-emphasized by this Court in *Thomas*, 534 U.S. 322, and relies on inapplicable cases involving the absolute censor of expressive activity instead of the application of reasonable time, place and manner regulations to permitted activity.

The Ninth Circuit's practice of ignoring this Court's precedent and relying on its own interpretation of the law wreaks havoc not only on the City of Long Beach, but every city, county, state, and federal entity within Ninth Circuit's boundary (constituting

nine states, two territories, and one-fifth of the U.S. population). Unabated, entities such as the National Park Service will have to operate under two sets of rules (for events inside and outside the Ninth Circuit) and local governments cannot protect the taxpayer from the excessive costs of granting the private use of public property. This dilemma is real and the solution is in the hands of this Court.

I. The Waiver Provisions Of The Long Beach Ordinance Are Constitutional

A. The Very Rigidity That Was Rejected By This Court Is Exactly What The Ninth Circuit And Respondents Contend Is Required

In *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002), this Court held that the permissive waiver of time, place and manner requirements which could otherwise be constitutionally imposed on a permittee "furthers, rather than constricts, free speech" and that while "[g]ranting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, . . . we think that this abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements." *Id.* at 325; *accord Parks v. Finan*, 385 F.3d 694 (6th Cir. 2004).

Rather than avoiding the very rigidity rejected by this Court, Respondents and the Ninth Circuit claim such rigidity is required. Citing Ninth Circuit precedent for this proposition, Respondent contends that in order to waive otherwise constitutional time, place and manner regulations, "a regulation must provide objective standards that do not . . . enabl[e] the official to favor some speakers and suppress others." Opp. 24 (quoting *Southern Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1139 (9th Cir. 2004)). Such a contention contradicts *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316, 325, and *Parks v. Finan*, 385 F.3d 694, 700 (6th Cir. 2004).

Indeed, the Ninth Circuit and Respondent miscontrue the distinction drawn by this Court between (1) the criteria needed to impose a constitutionally viable time, place and manner regulation and (2) the criteria needed to waive a constitutionally valid requirement that could otherwise be lawfully imposed on a permittee. Respondent contends that the test is the same for both instances. This Court has held that they are not. *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002).

Respondents' citation to *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600 (6th Cir. 2005) is equally unavailing. Indeed, the waiver at issue in *City of Dearborn*, *supra*, was constitutionally dissimilar to the waiver here, the waiver in *Thomas* (534 U.S. 316), and the waiver in *Parks v. Finan*, (385 F.3d 694). Rather, the waiver in

City of Dearborn, *supra*, constituted the bases for granting or denying a permit and, therefore, was properly judged by a different standard than is applicable in the present case. *See Parks v. Finan*, 385 F.3d 694, 700 (6th Cir. 2004) ("[b]ecause the waiver provision does not act as a restriction on expressive activity, the discretion must be treated differently from that contained in the bases for granting or denying a permit. . . .").

B. The Record Is Void Of Any Evidence Of A Pattern Of Unlawful Favoritism

Respondents' conclusion that the City's "waiver provision has been used capriciously to impose a substantial financial burden on Respondents" (Opp. 27), is not only speculative, but is necessarily premised upon the false assumption that Respondents are not required to reimburse the City when the City incurs significant expense due to their event. Respondents attempt to divert attention from this fact by raising the nefarious inference of favoritism due to the fact that they were not charged for a prior event allegedly attended by a single city councilman. What Respondents conveniently omit is the fact that the City did not incur any significant expense with respect to this prior event. (ER: 38). Moreover, Respondents' assertion that "any City Council

member . . . [can] waive all fees and costs for a special event" (Op. 8) is incorrect.[1]

Consequently, the conclusion that the fees were waived in the prior was because governmental officials participated in the prior event is pure "speculation this Court is not permitted to indulge in when nullifying the acts of a legislative branch" (*Carey v. Brown*, 447 U.S. 455, 476, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) (Rehnquist, dissenting)) and does not evidence a pattern of unlawful favoritism.

II. The Long Beach Ordinance Is Not Speculative

LBMC § 5.60.010(I)(3) provides that a special event permit is required for an "organized activity involving seventy five (75) or more persons . . . which involves the use of, or has an impact on, public property or facilities and may require the provision of city services in response thereto." (App. 194). The City subsequently issued an administrative regulation which limited the application of LBMC § 5.60.010(I)(3) to circumstances where "[t]he activity is likely to require the provision of city services for the purpose of: . . . street blockage, . . . erecting

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[1] The waiver provisions contained in LBMC §§ 5.60.050(A) and 5.60.090(A) provide that the waiver of permit fees or departmental services charges may only be accomplished by action of the entire City Council – not any single member. (App. 210, 217).

barriers, . . . construction, . . . traffic control, and/or . . . litter abatement (for amounts in excess of that normally expected for the public property or facilities involved)." (App. 224).

Citing *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600 (6th Cir. 2005), Respondents contend that the City's narrowing construction is vague and speculative. Opp. 10-11. Such a contention is without merit and is not supported by the cited authority.

In *City of Dearborn*, *supra*, 418 F.3d 600, the City of Dearborn enacted an ordinance that provided that "it shall be unlawful to participate in any special event upon any street, park or public area of the city of Dearborn unless such activity is granted by resolution of the City Council." *Id.* at 603. Such an ordinance was deemed overbroad "because virtually any group of two or more persons walking on a public right of way . . . would presumably be required to possess a permit under the Ordinance." *Id.* at 608. The City of Dearborn subsequently offered a narrowing construction which provided that a permit is only required if the activity required the provision of unspecified city services. *Id.* at 613. Beyond failing to provide a small group exception, the Sixth Circuit found the ordinance unconstitutional because the narrowing construction was vague as to when and what city services may be required. *Id.* at 614.

Unlike *City of Dearborn*, *supra*, 418 F.3d 600, Long Beach's administrative regulation only requires

a permit when five (5) specific city services are likely to be required (street blockage, erecting barriers, construction, traffic control, and litter abatement (for amounts in excess of that normally expected for the public property or facilities involved)). Whether these specific services will be needed is within the knowledge of event organizers, leads to no speculation, and avoids the numerical and vagueness issues found in *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600 (6th Cir. 2005).

III. The Requirement Of A Special Event Permit In Order To Recoup Costs Caused By Litter Abatement Is Constitutionally Permissible

There is a vast constitutional difference between (1) regulations *absolutely prohibiting* First Amendment activity and (2) regulations seeking to advance a legitimate governmental interest by adding a reasonable time, place and manner requirement to permitted First Amendment activity. The first is a prior restraint subject to strict scrutiny while the second is not.

The Ninth Circuit and Respondent contend that litter abatement is not a legitimate governmental interest by relying on inapposite cases where public entities sought to *absolutely prohibit* First Amendment activities in the name of litter abatement. *See Schneider v. New Jersey*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939) (regulation banning leafleting);

Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) (regulation banning door-to-door solicitation); *Jews for Jesus, Inc. v. MBTA*, 984 F.2d 1319 (1st Cir. 1993) (regulation banning leafleting); *Krantz v. City of Fort Smith*, 160 F.3d 1214 (8th Cir. 1998) (regulation prohibiting placing religious literature under windshield wipers of parked vehicles); *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092 (9th Cir. 2003) (regulation prohibiting leafleting).

Contrary to the authorities on which Respondent relies, the City does not seek to prohibit First Amendment activity in the name of litter abatement. *See Paulsen v. Gotbaum*, 982 F.2d 825 (2nd Cir. 1992). Rather, by requiring a permit when a special event is likely to generate litter in amounts in excess of that normally expected for the public facilities involved, the City is simply seeking "financial accountability for damage caused by the [permitted] event." *Thomas v. Chicago Park District*, *supra*, 534 U.S. at 322. Accordingly, the Ordinance is "easily distinguishable [from cases] . . . involv[ing a] complete ban[] of a certain type of speech. . . ." *Paulsen v. Gotbaum*, 982 F.2d 825, 829 (2nd Cir. 1992); *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

As here, *Paulsen v. Gotbaum*, 982 F.2d 825, dealt with a permitting scheme for large special events in New York City parks "includ[ing] concerts by Pavarotti and Paul Simon, the New York City Marathon, and the Billy Graham Crusade" (*id.* at 829) and it was similarly contended that "the requirement of the clean-up bond for the distribution of literature . . .

constituted an impermissible and unconstitutional burden on free speech." *Paulsen v. Gotbaum*, 982 F.2d at 827-28. Accordingly, Respondents attempt to distinguish *Paulsen* by stating that the ordinance in "*Paulsen* . . . did not [seek] . . . to recoup the costs of litter abatement" (Opp. 15 n. 7) is inaccurate.

Lastly, Respondents' contention that this issue is moot is not well taken. Indeed, the result of *all* administrative action in this matter leaves the Ordinance and its narrowing construction exactly as they existed on the date the Ninth Circuit rendered its decision herein.[2]

Accordingly, requiring a permit when a special event (including, but not limited to the Long Beach

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[2] There is currently pending a hearing in the District Court regarding severability as directed by the Ninth Circuit on remand. The City's motion to stay proceedings pending resolution of the City's Petition for Writ of Certiorari was denied by both the Ninth Circuit and the District Court. Accordingly, in order to save the balance of its Ordinance which was necessary for ongoing operations, the City issued an administrative regulation to demonstrate the viability of the Ordinance should the Ninth Circuit's opinion be upheld. This subsequent and unpublished regulation has since been revoked and the original narrowing construction referenced by the Ninth Circuit is in full force and effect. *See* AR 8-31 (Reply App. 1); *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ("In evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a[n] . . . enforcement agency has proffered") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)).

Grand Prix and Long Beach Jazz Festival[3]) will generate excessive litter and debris for which the City will be financially burdened is a constitutionally permissible time, place and manner regulation and the Ninth Circuit's opinion to the contrary is in direct conflict with *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002) and *Paulsen v. Gotbaum*, 982 F.2d 825, 829 (2nd Cir. 1992).

IV. The Availability of Streets And Sidewalks Provides Ample Alternate Means Of Communication For Persons Unable To Obtain Permission To Conduct A Spontaneous Parade, Assembly, Or Demonstration

Contrary to the panel's holding, the Ordinance provides ample alternative means of communication for people wishing to participate in spontaneous expressive events by allowing groups unable to obtain or denied permission to conduct a spontaneous parade, assembly or demonstration[4] to conduct their event on any "street[], sidewalk[], or other public rights-of-way owned or controlled by the City . . . [so

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[3] "The effect of the rules must be viewed in . . . light of all . . . events." *Paulsen v. Gotbaum*, 982 F.2d 825, 829 (2nd Cir. 1992); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296-97, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) ("the validity of [the] regulation need not be judged solely by reference to the demonstration at hand.").

[4] LBMC § 5.60.030(A)(5).

long as] applicable traffic regulations, laws or controls are complied with." LBMC § 5.60.030(A)(3) (App. 198); *Frisby v. Schultz*, 487 U.S. 474, 180 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (the availability of public streets and sidewalks "makes it virtually self-evident that ample alternatives remain").

Respondents' Opposition utterly fails to address that for "'time out of mind' public streets and sidewalks have been used for assembly and debate, the hallmarks of a traditional public forum" and provide ample alternative means of communication. *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (citing *Boos v. Barry*, 485 U.S. 312, 318, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988)); *Cornelius v. NAACP Legal & Educational Fund, Inc,*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

V. The Long Beach Ordinance's Indemnification Provision Is Constitutionally Permissible

The Long Beach Ordinance requires permittees to indemnify and hold the City harmless from any "claims, damages, expenses, loss, or liability . . . arising out of, or resulting from the alleged acts or omissions of [a] permittee . . . in connection with the

permitted event or activity . . . " LBMC § 5.60.080(A) (App. 214-15) ("Indemnification Provision"). The permit application follows this language by stating that the permittee "will hold the City harmless from liability caused by the conduct of the event." App. 58.

After reiterating the panel's opinion, Respondent asserts that the Indemnification Provision is unconstitutional because it does not contain the language "proximately caused by the action" of the permittee. Opp. 22. While Respondent can cite no authority for requiring this language, such a requirement is in direct conflict with the Ninth Circuit's holding in *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006) (upholding an indemnification provision absent such language) as well as the indemnification provision of the National Park Service (36 C.F.R. § 25156(d)(1)) and the federal General Services Administration. *See* Petition p. 35.

Likewise, the panel's and Respondents' contention that *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), precludes indemnification is not well taken. Unlike *Claiborne Hardware*, *supra*, indemnification here is limited to the "acts or omissions of [the] permittee" (App. 214-15), *not* third parties. Moreover, the First Amendment does not excuse a permittee for damage he causes to public property. Simply put, a public entity is entitled to seek "financial accountability for damage caused by . . . [a special] event" by and

through indemnification. *Thomas v. Chicago Park District*, *supra*, 534 U.S. at 322.

Lastly, it is important to reiterate that the statement in the City's special event permit application providing that the permittee "will hold the City harmless from liability caused by the conduct of the event" is grammatically consistent with the Ordinance and does not expand indemnification to include the actions of third parties and, to the extent it is, in any way inconsistent with the Ordinance, it must be disregarded. *United States v. Larionoff*, 431 U.S. 864, 872, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977) ("In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945)).

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should properly be granted.

Respectfully submitted,

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[Logo] ***City of Long Beach***

Administrative Regulation

Number AR 8-31, Issue 1
Effective: January 4, 2009

I. Purpose

The purpose of this regulation is to rescind administrative regulation AR 8-28, Issue 2 and to reinstate AR 8-28, Issue 1 which sets forth policies and procedures governing the implementation of Long Beach Municipal Code Chapter 5.60 (Parades and Special Events).

II. Scope

This regulation is applicable to all City departments and offices responsible directly to the City Manager. Any and all existing administrative regulations in conflict with this regulation are hereby rescinded. It is also requested that elective and other independent offices and departments of the City comply with these procedures in the interest of administrative uniformity.

III. Amendment

The City Manager may amend the procedures and contents set forth in this regulation from time to time as appropriate. Any amendment shall supercede any previously issued version and/or issue.

IV. Policy

Effective immediately, administrative regulation AR 8-28, Issue 2 is hereby rescinded and administrative regulation AR 8-28, Issue 1 is hereby reinstated and is in full force and effect.

V. *Authorized By:*

/s/ Patrick H. West
Patrick H. West,
City Manager